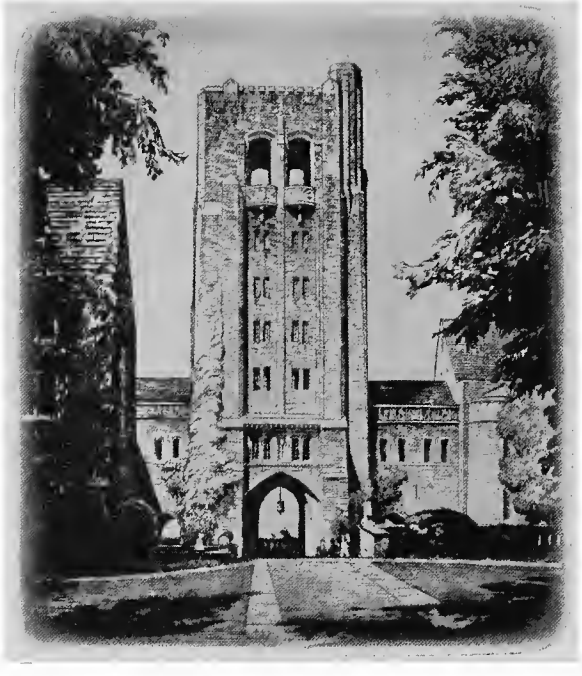

THE FEDERAL COURTS

AND THE

ORDERS

OF THE

Interstate Commerce Commission.

By H. T. NEWCOMB,

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"Some Consequences of the Trust Movement," "A Study in
Municipal Socialism," "Some Recent Phases of the Labor Problem."
"The Work of the Interstate Commerce Commission," "Who Own the Railroads,"
"The Regulation of Interstate Railways," etc., etc.

"My own judgment is that the Interstate Commerce Commission, notwithstanding my great respect for that body—a respect which I share with many lawyers and nearly all the judges of this country—has failed in its part of the administrative work of putting into execution the Interstate Commerce act. I think the Commission has looked at it from a wrong attitude of mind. I think it has put itself rather in the position of a court than that of an inquisitor. I think it has deserted the inquisition, which is the Commission's part of the work, and has been trying to climb upon the tribune, which is another part of the work. I think it has put on the robes, when perhaps it ought to have worn the overalls."

—JUDGE GROSSCUP, March 11, 1905.

PRESS OF GIBSON BROTHERS.
WASHINGTON, D. C.
1905.

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THE FEDERAL COURTS AND THE ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

By H. T. Newcomb.

The annual report of the Interstate Commerce Commission submitted to Congress in December, 1904, shows that at that time there had been received by the Commission 789 formal and 3,223 informal complaints. On October 9, 1904, the Commission had rendered 297 formal decisions, but as two or more cases were often considered and decided together, the total number of cases decided amounted to 359. Of the cases decided, 194 were decided in favor of the complainants; that is, there were 194 cases in which, if the action recommended by the Commission had been taken by the defendants, some benefit would have accrued to those who prompted the complaints. A report submitted to the United States Senate, by the Commission, on December 21, 1896 (Senate Document No. 30, Fifty-fourth Congress, Second Session), shows the action taken by the defendants in 107 instances in which the decision of the Commission was more or less favorable to the complainants. From this report it appears that in 58 of the 107 cases included, there was complete, voluntary obedience

to the Commission's order. In 11 more there was voluntary, partial obedience, while in another case the Commission reports that "some changes" were made. It is to be observed, concerning these twelve cases, that the degree of obedience was at least sufficient to prevent further action on the part of the Commission or the complainants. It appears, therefore, that in 107 cases there were only 37 in which the defendants declined substantially to comply with the Commission's recommendations.

The informal complaints considered by the Commission are settled without formal reports or orders. As the Commission has decided but 359 out of 789 formal complaints and as it has never been charged that its docket is clogged by an excessive number of undecided cases, the inference is warranted that more than half of the cases formally submitted are settled while pending. It follows that 90 per cent of the matters submitted to the Commission are settled satisfactorily to both parties without formal orders. Of the 10 per cent not settled in that way it appears that, up to the present time, in almost one-half the defendants have been justified in their refusal to make the desired changes in rates or methods by the final conclusions of the Commission. As already noted, in only 194 out of more than 4,000 cases submitted, has the Commission seen fit to order changes in rates or in methods or practices which affect or control rates. But when the Commission has

issued formal orders requiring affirmative action on the part of the railways, they have usually been obeyed. The best available record, quoted above, shows that they have been obeyed in nearly 70 per cent of the cases.

Few Cases Have Gone to the Courts.

When obedience to an order of the Commission is refused, that body, or any one interested, has the right to appeal to a Circuit Court of the United States, sitting in equity, for a decree requiring obedience. Up to the present date (April 10, 1905), 45 cases of this sort have gone to the courts. Eleven of these cases have either been withdrawn, or have not been actively prosecuted, or there has not yet been time for judicial action. Sixteen of them have been carried to the Supreme Court of the United States, and in no case has that body decided in favor of the enforcement of the Commission's order; in one case, only, its decree required the enforcement of a portion of the order. Of the remaining 28 cases the Commission has lost 26. Appeals are now pending from three of these cases in which the decision was adverse to the Commission, and from one in which it was adverse to the railway defendant.

Had the Interstate Commerce law from the beginning been in the form which the Commission now desires shall be substituted for the present statute, the only cases, out of the more than 4,000 which have been submitted to the

Commission, that would have been affected, are the 45 which have gone to the courts, or less than 1 1-5 per cent of the total number. As has already been shown only 34 of these cases have been adjudicated, but the decisions of the courts show that in a large portion of the adjudicated cases such a difference in the law would not have affected the result. In other words, it is not true, as is so frequently asserted by those who desire radical legislation, that the frequent disapproval of the conclusions of the Commission by the Federal courts, has been wholly due to the fact that the Commission's interpretation of the law has not had the sanction of the courts. While it is perfectly true that, in the natural desire to enlarge the scope of its authority, the Commission has often reached conclusions of law which the courts have declared to be erroneous, it is equally true that its determinations of facts and the conclusions which it has drawn from them, have frequently received judicial condemnation. A study of the decisions of the courts, with a view to determining whether, on the whole, the results of the litigation in the several cases have been such as tend toward the establishment and perpetuation of just relations between shippers and carriers, affords a complete refutation to the argument so often advanced that the Commission has been right, that the law is wrong, and that, therefore, the law ought to be modified.

Passenger Traffic Cases.

Passenger rates have been the subject of controversy in but two of the cases in which the Courts have been appealed to for the enforcement of the Commission's orders. One of these cases was that of a negro named Heard, who obtained an order from the Commission directing the Georgia Railroad to discontinue practices, connected with the use of so-called "Jim Crow" cars, which were regarded as unjustly discriminating against the complainant. This case was withdrawn before decision. The other passenger rate case is known as the "Party Rate" case (see page 29). It arose through the desire of one railway company to be relieved from one phase of its competition with a rival carrier. The order of the Commission would have mitigated the competition in the desired degree had not the Court declined to enforce it. Whether the outcome of this case resulted in substantial justice may be inferred from the statement of the Court that in making these "party rates" the defendant was merely putting into practice a "reasonable and well settled business practice," that its revenues would "be seriously impaired" if the practice were discontinued, and that this practice afforded "convenience and benefit" to a portion of the public.

Carriers' Methods.

Three of the cases which have gone to the Courts have related to transportation practices rather than to rates. One of these, the "Orange Routing" case (see page 182), appears to have been due to an effort on the part of the complainants to secure the continuance of illegal and secret deviations from the schedules, by parties other than the defendants, which amounted to rebates. The Commission decided in favor of the complainants, but there was a strong dissenting opinion from the Chairman (see page 183). The Circuit Court has decided this case in favor of the enforcement of the Commission's order, but an appeal is now pending. Another case of this character, the "Cartage" case (see page 47), was prompted by the desire of one railway to weaken a competitor. In this effort the carrier was able to secure the co-operation of the Commission, but again its decision did not survive judicial scrutiny. The Circuit Court called attention to the admission of the counsel for the complainants before the Commission, that the complainant had no real grievance but had been instigated in making complaint by a railway which was paying the expenses of the litigation, and the Circuit Court of Appeals noted that the effect of enforcing the order would practically deprive the defendant of its ability to compete with the rival which was responsible for the complaint. Another

of these cases was brought at the instance of a railway which desired to be relieved of a contract that it had entered into with other railways, and to force the latter to provide, at their own expense, facilities for bringing about that result. The Circuit Court, which refused to enforce the Commission's order, declared this to be the fact, and asserted that the Interstate Commerce law "was never intended to invade the domain of private contracts between common carriers, which were valid when made, and are not in conflict with the provisions of the law."

Long and Short Haul Cases.

The remaining cases in which appeal has been made to the courts have been those in which the Commission has attempted to control adjustments among freight rates. Roughly speaking, these are of two classes. Those in which the whole question has been that of absolute or relative reasonableness under the First or Third sections of the Act, and those in which the Fourth or long and short haul section has been involved. Of the long and short haul cases, which considerably exceed the others in number, it may be said that, if in any of them there were unjust relations which might have been relieved through the lawful action of the Commission, that body adopted an erroneous interpretation of the law which prevented the beneficial results that might have followed action clearly within its authority. The only

case under the Fourth section which can be regarded as an exception to this rule is the "San Bernardino" case (see page 34), decided by the Commission while it adhered to the rule, laid down by Judge Cooley with the unanimous approval of his colleagues as members of the original Commission, that the carriers must judge for themselves in each instance whether there are dissimliar circumstances and conditions which permit exceptions to the general rule that there shall be no higher charge for intermediate hauls than for longer hauls over the same line in the same direction, when the latter include the former. In the "San Bernardino" case, however, the Court, while not criticising the conclusions of the Commission as to matters of law, declared that the facts were "widely different from those set out in the report of the Commission."

From its organization in 1887 until November, 1892, the Commission adhered to the rule, just referred to, which was formulated in the first important case that arose under the Fourth section. In deciding the Georgia Commission cases (see page 87), however, the Commission abandoned this rule so far as it related to the competition of carriers subject to the Act to regulate commerce and declared that where the dissimilarity of circumstances relied on to justify exceptions to the general rule were the consequence of such competition, dissimilarity could not be set up as a defense to a complaint of violation of the law, but must be made the

basis of an application to the Commission for permission to make the greater charge for the intermediate haul. After adopting this interpretation of the law, the Commission for a number of years declined to consider evidence tending to prove the existence of dissimilar conditions arising through the competition of interstate railway carriers or of different markets, thus preventing the introduction of testimony which the courts have declared to be of controlling importance. It is true that this erroneous interpretation of the law has prevented the enforcement of the orders in these cases, but it is equally true that the Commission never expected obedience to them, and that they are to be regarded as strategic moves in a combat which the Commission proposed to conduct along lines that it hoped would force the carriers to appeal to it for relief. There seems to be ample justification, not only in the case to which it was applied, but in most of these cases, for the observation of the Supreme Court, in deciding the Chattanooga case (see page 78), that in making its order "the Commission thought that literal enforcement would bring about an injustice * * *" In fact, before making some of them, the Commission allowed an interval to elapse for the avowed purpose of permitting applications for relief, and it provided for the suspension of several of the orders after they were made in case such application should be made. In many of these cases the Courts distinctly expressed the view that there was no

injustice in the rate relations which were made the subject of complaint, and there can be no controversy over the suggestion that their enforcement would have brought injustice. There is probably no one of these cases in which the enforcement of the Commission's order would, directly, have modified the rates actually paid. The carriers affected might have been compelled to withdraw their competition for the long haul traffic, but it is not at all likely that in any case they could have afforded to reduce their intermediate rates to the level fixed by competition at the terminals. In a few more recent cases the Commission has recognized the illegality of its former efforts and has given what it has regarded as sufficient consideration to competition of the character formerly declared to be without effect as a defense. In these cases, however, the Commission appears to have fallen into the error of imagining that it was the purpose of the law to deprive certain communities of natural advantages of location which enable them to enjoy the service of great and competing routes of transportation, by land or by water or by both.

The Griffin case (see page 148) is typical. The court said that the enforcement of the Commission's order would, as its first effect, "immediately disorganize and disarrange the entire commerce of which Macon is the receiving and distributing point;" and that, without material benefit to the producers and consumers at Griffin, "the commerce of

Macon would be destroyed in exact proportion with its inability to meet the prices of its competitors."

Attempts at Rate Making.

The last class of cases which need be mentioned is that in which the Commission has attempted to control rates either absolutely or relatively. The cases of this sort which have gone to the courts have sometimes been decided against the Commission because of its attempts to exercise legislative functions that have never been delegated to it, but a study of the decisions themselves, affords ample warrant for the statement that the disapproval of the Commission's action has usually extended to its conclusions upon the facts. Thus, in the "Coxe" case (see page 37) the court reported that the basis of the Commission's determination as to what constituted a reasonable rate under the circumstances was an "unwarrantable" and "unreliable" estimate which the Commission had based upon "an erroneous principle." In the "Social Circle" case (see page 42) the court declared that the Commission had omitted to consider a fact of controlling importance, and in the "Cattle Raisers'" case (see page 160) the Supreme Court distinctly said that in its opinion "the order of the Commission was not sustained by the facts upon which it was predicated."

Powers of the Commission.

It is frequently urged that when the courts have differed with the Commission in their conclusions of fact, it has been as a consequence of the right of the courts to make their investigations as broad as seems to them desirable. They are not bound by the testimony heard by the Commission. It has been common for new testimony to be introduced in the Circuit Courts, and some of the decisions show that this testimony has been of controlling force. The investigating powers of the Commission, however, are most ample. It is not strictly bound by the ordinary rules of evidence, and the courts have held that in deciding whether their aid shall be available, as provided in the law, for compelling the production of testimony, either oral or documentary, before the Commission, they must be very liberal in determining what inquiries are material and relevant. In other words, if in certain cases the record made before the Commission has not been complete enough to afford the basis of a satisfactory determination of the matters involved by the courts, it has been because the Commission itself did not utilize the broad powers of investigation conferred upon it by Congress. It has always had the power to extend its investigations in any case to the most remotely relevant or material fact. If it has failed to appreciate the importance of evidential facts which have been brought out in subsequent proceedings before the courts, it is certainly credit-

able to the wisdom of Congress that the law has provided for supplementing its inquiries.

The Commission is not a powerless or impotent body. The interpretation of the present statute by the courts is now almost, if not quite complete. If the Commission chooses frankly to accept the definitions of its authority laid down by the courts, and to proceed in accordance with them there can be no genuine case of injustice in the relations between railway carriers and their patrons, in which some relief cannot be secured under the statute as it stands. The records show that numerous modifications in rate schedules have been secured through the operation of the law and the intervention of the Commission. It is only in less than 2 per cent of the cases of alleged injustice which have been brought to the attention of the Commission that the record discloses that it has not succeeded in doing that which it has attempted. A part of this 2 per cent of all the cases has gone to the courts, and in all but three instances the courts have, for one reason or another, concluded that the Commission has acted illegally.

The brief epitome of the cases which has been given above is supplemented by the memorandum on the following pages in which each of them is separately considered and analyzed. There are very few in which the extracts from the decisions of the courts that are given do not show that, to the judicial view, the action of the Commission appeared to be unwise as well as unlawful.

MEMORANDUM

In re Refusals of Federal Courts to enforce the orders of the Interstate Commerce Commission.

MEMORANDUM

In re Refusals of Federal Courts to enforce the orders of the Interstate Commerce Commission:

Kentucky and Indiana Bridge Company Case.*

"The law never contemplated such results."—Decision of the Circuit Court in this case.

In this case the Commission entered an order in favor of the complainant which was not obeyed by the defendant and proceedings were instituted in the Circuit Court by the complainant before the Commission for the enforcement of the latter's order. The Circuit Court dismissed the complaint and no appeal was taken.

This is a leading case in the interpretation of the Interstate Commerce law, and has apparently settled for all time

* The Kentucky and Indiana Bridge Company *vs.* The Louisville and Nashville Railroad Company; Inter. Com. Comm. (2 I. C. C. Rep. 162), decided August 2, 1888. The Kentucky and Indiana Bridge Company *vs.* The Louisville and Nashville Railroad Company; Circuit Court for the District of Kentucky (37 Fed. Rep. 567), decided January 7, 1889.

many important points as to the jurisdiction and powers conferred upon the Commission or which can constitutionally be conferred upon a body so constituted. These matters, however, are not germane to the present inquiry which is whether, on the whole, the result of the litigation was in accordance with substantial justice.

On June 5, 1872, the Louisville and Nashville, the Jeffersonville, Madison & Indianapolis, and the Ohio & Mississippi railway companies entered into a contract with the Louisville Bridge Company, a corporation with which the complainant in this case afterwards became a competitor, the contract stipulating, among other things, that the Ohio & Mississippi Railway would forward over the bridge of the Louisville Bridge Company "all the freight, passengers, mails, express matter, and other goods carried on and over their roads, to and from Louisville and to and from points which require their passage over the Ohio river at or near Louisville." On September 26, 1886, the Ohio and Mississippi entered into a contract with the complainant, The Kentucky and Indiana Bridge Company, which contemplated the abandonment of the pre-existing contract of the former with the Louisville Bridge Company and the transfer of its business across the Ohio river near Louisville to the complainant. The continued use of the bridge of the Louisville Bridge Company by the Ohio and Mississippi, in accordance with its former contract, was decidedly to the

advantage of the defendant. In order to compel such use the defendant refused to interchange traffic with the complainant at Seventh street and Magnolia avenue in Louisville, where their lines were physically connected, and demanded that such traffic be delivered at one or the other of its four freight yards in the city of Louisville. The complaint was brought by the Kentucky and Indiana Bridge Company for the purpose of compelling interchange at Seventh street and Magnolia avenue and was really intended to compel the defendant to permit the Ohio & Mississippi, which was not a party to the action, to do that which was in violation of its contract with the defendant. The order of the Commission would have produced this result, and the refusal of the Circuit Court to enforce that order was therefore a refusal to use the process of that Court to aid in the violation of a contract. The following is from the decision of Judge Jackson:

"While the Ohio and Mississippi Railway Company is not an actual party to this controversy, which this court is required 'to hear and determine as a court of equity,' it is however, perfectly manifest that this proceeding, as well as that before the Commission, is intended for the private benefit not merely of petitioner, but of the Ohio & Mississippi Railway Company; and its object is to relieve the latter from the contract of June 5, 1872, in order that petitioner may secure from it the rental stipulated to be paid for the use

of its bridge; the Ohio & Mississippi Railway Company not being bound by the contract of September 29, 1886, to pay petitioner 'any tolls' thereunder until its liability for tolls, charges, or rentals under the contract of June 5, 1872, with the Louisville Bridge Company, is removed. Now, the contract of June 5, 1872, which the Ohio & Mississippi Railway Company entered into with the Louisville Bridge Company and other railroad companies, including respondent, and in the maintenance and enforcement of which respondent has a direct business and pecuniary interest, was neither abrogated nor annulled by the Act to regulate commerce. The provisions of that contract are not in conflict, but in strict conformity, with both the letter and spirit of the act of Congress.

"Under the terms and operation of that contract, which is still in full force as against the Ohio & Mississippi Railway Company and all parties thereto, the Ohio & Mississippi Railway Company had and enjoyed all reasonable, proper, and equal facilities with any and every other railroad company entering Louisville from the north side of the Ohio river, and interchanging traffic with respondent. It voluntarily abandoned these facilities in 1888, changed its business to the petitioner's bridge, not in the interest of the public or of the interstate commerce it handled, but for its private benefit and advantage; and petitioner now seeks to secure for it, as well as for itself, the same terms and facilities which existed under the contract of June 5, 1872, and without subjecting either to the obligation of compensating respondent, or sharing in the expense of an interchange, as provided in the contracts of May 22, 1873, and

May 16, 1888. The Act to regulate commerce, no more than the act of June 15, 1866 (Section 5258, Rev. Stat. U. S.), was never intended to invade the domain of private contracts between common carriers, which were valid when made, and are not in conflict with the provisions of the law.

"In Railroad Co. *v.* Richmond, 19 Wall. 590, the Supreme Court says of such contracts, 'that the observance of good faith between parties and the upholding of private contracts and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences, than the public policy sought to be established in the facilitation of commercial intercourse among the States, which the act of June 15, 1866, aimed to promote.' Under such circumstances as surround the parties, neither the Ohio & Mississippi Railway Company nor the petitioner, who, for private advantage, is co-operating with the Ohio & Mississippi Railway Company in trying to escape from the obligations of said contract of June 5, 1872, are in a position to commend themselves to the favorable consideration of a court of equity, and no strained construction of the law should be made in order to afford them or either of them, the relief they seek at the hands of the court."

On the question of fact as to whether the point of interchange demanded by the complainant was a suitable one the Commission and the Court differed widely. The Commission said:

'We hold that the point of connection at Seventh street

and Magnolia avenue in Louisville is a convenient and suitable point for making exchange of traffic between complainant and any carrier that may make use of its tracks, and the defendant."

The Court, on the same point, said:

"The fourth point presented in this case, which is whether petitioner's connection with respondent's road at Seventh street and Magnolia avenue in Louisville, is a proper, suitable, and convenient place for the interchange of traffic between them and the railroads using petitioner's track, and whether respondent's refusal to interchange at said point is an unreasonable and unjust discrimination against petitioner, and the carriers using its tracks, involves questions both of fact and law. * * *

"Now, it clearly appears from the foregoing statement of facts that respondent has already established, and has in use in the city of Louisville, four suitable, ample, and conveniently located and fully-equipped yards and depots, at one or the other of which it receives and delivers all freights arriving at or departing from Louisville, and makes all its interchanges of freights with other lines, furnishing to the latter at said places 'all reasonable, proper, and equal facilities,' not only for such interchange of traffic, but also 'for receiving, forwarding, and delivering of passengers and property to and from its line or lines, and those connecting therewith,' and does this without discrimination in its rates and charges as between such connecting lines. At petitioner's Seventh street and Magnolia avenue connec-

tion neither respondent nor petitioner has any yard, station or depot; neither owns any ground there except respondent's right of way, 66 feet in width on which its double main tracks are located; neither has any buildings, sheds, or platforms there for the reception and accommodation of freights to be handled and exchanged at that point; nor has either of them any clerks or employees stationed there for the inspection of cars, receipting for freights, etc. Without such accommodations, and without the employment of such clerical force located there, an interchange of traffic at said point cannot be made in a proper and convenient way to either party. * * *

"With no facilities at said Seventh Street and Magnolia connection for the interchange of traffic, or for the receiving, forwarding, and delivering of property there, and being under no legal duty or obligation to provide such facilities at said point, upon what principle can it be successfully asserted that in declining to transact such business at such place respondent is refusing or denying to petitioner and the roads using its track 'all proper, reasonable, and equal facilities' for the interchange of traffic, or for receiving, forwarding, and delivering of property, such as it has provided and affords to other connecting lines at its Ninth and Broadway yard and depot? * * *

"It is perfectly manifest from the location of the said Seventh street and Magnolia connection, and from the lack of all suitable and proper accommodations there for conducting the business involved in the interchange of freights, and from the manner in which such freight, whether in carload or broken lots, would have to be handled by respon-

dent, that, if respondent is required to furnish at that point all proper, reasonable, and equal facilities, or, as required by the order of the Commission, 'the same equal facilities' which it furnishes and affords to the lines connecting with it at Ninth and Broadway yard, petitioner will thereby secure benefits and advantages superior to those conferred upon any other connecting line or lines, and largely, if not entirely, at respondent's expense. The order of the Commission imposes no terms and conditions under which the interchange at said connection shall be made. * * *

"But, without the imposition of such terms and conditions it is clear that petitioner and the railroads using its tracks and seeking an interchange at said connection will secure, without cost, to themselves or compensation to respondent, services, and the benefit of facilities and of employees, for which other connecting lines interchanging at other places make respondent compensation, and bear their proportion of the terminal expense. The law never contemplated such results."

Party Rate Case.*

"It was not the design of the Act to stifle competition."—Decision of the Supreme Court in this case.

The Commission's order in this case did not have the approval of either of the courts which passed upon it. It is worth noting that while the original complaint was filed with the Commission on July 10, 1889, and decision rendered on February 21, 1890, seven months and eleven days thereafter, the petition for the enforcement of the Commission's order which was filed in the Circuit Court on May 1, 1890, was dismissed by that court on August 11, 1890, or only three months and eleven days later.

The complainant in this case, being a railway company, was engaged in competition with the defendant for passenger traffic, and the latter chose to offer prospective passengers opportunity to combine in parties of ten or more and to purchase single tickets covering such groups of travellers at a lower average charge per capita than the single fare at the

* Pittsburg, Cincinnati & St. Louis Railway Company *vs.* Baltimore & Ohio Railroad Company; Inter. Com. Comm. (3 I. C. C. Rep. 465), decided February 21, 1890. Interstate Commerce Commission *vs.* Baltimore & Ohio Railroad Company; Circuit Court, Southern District of Ohio (43 Fed. Rep. 37), decided August 11, 1890. Interstate Commerce Commission, Appellant, *vs.* Baltimore & Ohio Railroad Company; Supreme Court of the United States (145 U. S. 263), decided May 16, 1892.

same time in force. Tickets of this class had long been known in railway practice by the name of "party-rate" tickets. The complainant did not care to issue tickets of this sort but objected to the business which they attracted going exclusively to its rival. The former, therefore, wished to have the practice of issuing such tickets declared illegal. The party rates of the defendant were not restricted to any particular class or section of the public but were open to all. On this point the Commission said:

"By the party-rate system the carrier says to all persons in substance—if you want one ticket for the transportation of ten or more persons on the same train to the same destination you can have it at a specified reduced rate below the regular rates."

The precise question before the Commission was whether persons travelling in groups of ten or more are carried under circumstances and conditions substantially similar to other persons travelling at the same time, singly, between the same points in the same direction. The broader question now under discussion is whether there is substantial injustice in charging the former less than the latter. The Commission discussed both questions and decided them both in the affirmative; the Circuit Court and the Supreme Court also discussed them both and decided both in the negative. Judge Jackson, who rendered the decision in the Circuit Court, said:

"Now it is neither claimed nor proved in the present case that defendant's charges, either for single passenger or 'party-rate' tickets, are in themselves unjust and unreasonable. On the contrary, both rates are shown to be just and reasonable. The public has, therefore, no ground of complaint on that score, nor has any legitimate complaint been made on its behalf, either by the original petitioner or by the Commission."

Further along in the decision, taking up the question of relative justice, he said:

"It is clearly shown by the proof that the same business reasons, considerations, circumstances, and conditions which induce the most enlightened railroad management, having due regard both to the interests of their lines and to the convenience of the public, to make reduced rates on mileage, excursion, long distances, round trip, time trip, or specified number of trip tickets apply in all their force to 'party-rate' tickets for ten or more persons travelling together in one body on a single ticket. Reduced rates to these several classes or descriptions of passenger traffic rest upon the same general principle, which the Act to regulate commerce nowhere calls in question, that common carriers may rightfully so adjust their charges as to encourage and develop travel; that the amount or volume of such traffic is a legitimate element to be considered in determining what reduction should be made over local or ordinary rates, so as to make both correspond with the cost of service and the fair profit which the carrier is entitled to earn from each class of travel. Quantity of traffic affects both the cost of service

and the legitimate profit which may be demanded for such service. When the profit on frequency of trips or on larger numbers transported at reduced rates reasonably corresponds with the fair profit of the carrier on a single trip, or smaller number transported at the ordinary higher rate, the carrier making such an adjustment of its charges with a view of encouraging and developing its legitimate business is only putting into practice the reasonable and well settled business principle of every avocation or trade, which recognizes quantity, whether arising from the number or size of the transactions, as a proper element in the consideration and adjustment of the price. No complaint was ever made against common carriers acting upon this principle. * * *

"The evidence before us shows that, if 'party-rate' tickets, as described and used by defendant, cannot be lawfully issued or should be discontinued, the revenues of common carriers derived from passenger traffic will be seriously impaired, while the convenience and benefit to the public, traveling in parties or bodies of ten or more, such as amusement companies, associations, clubs, organizations, delegates, and representatives attending conventions, religious, educational, or political, will at the same time be greatly interrupted and prejudiced."

The Supreme Court sustained the view of the Circuit Court, and the decision by Judge Brown received the unanimous approval of his colleagues. It repeats much of the reasoning adopted by Judge Jackson and only a brief quotation need be made.

In part, the Supreme Court said:

"These tickets then being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is, whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others, * * * Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business and enable the larger ones to drive them out of the market. The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward anyone it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the Act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another.

* * * * * * *

"The evidence shows that the amount of business done by means of these party-rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing."

San Bernardino Case.*

*"The facts * * * are widely different from those set out in the report of the Commission."—Decision of the Circuit Court in this case.*

In this case the Board of Trade of San Bernardino contended that the higher charges from New York, Cincinnati, Detroit, Chicago, and St. Louis to San Bernardino, than from the same points, over the same lines, to Los Angeles, a more distant point, were in violation of the Fourth section, or long and short haul clause of the Interstate Commerce law. This clause forbids higher charges to intermediate than to more distant points on the same line in the same direction when the transportation to the points compared is contemporaneous and is undertaken under "substantially similar circumstances and conditions." The defendant alleged that the lower charge to Los Angeles was justified by dissimilar conditions growing out of water competition at that point which did not exist at San Bernardino. The Commission decided in favor of the com-

* The San Bernardino Board of Trade *vs.* The Atchison, Topeka & Santa Fe Railroad Company *et al.;* Interstate Commerce Commission (4 I. C. C. Rep. 104), decided July 19, 1890. Interstate Commerce Commission *vs.* Atchison, Topeka & Santa Fe Railroad Company *et al.;* Circuit Court Southern District of California (50 Fed. Rep. 295), decided April 25, 1892.

plainant, denying the existence of actual water competition at Los Angeles, and declaring that potential competition could not be made to justify an exception to the ground-rule of the Fourth section. Its order required the discontinuance of the existing relation on September 1, 1890. It would have been satisfied either by a reduction of the San Bernardino rates or by advancing the Los Angeles rates.

As this order was not obeyed the Commission appealed to the Circuit Court for its enforcement. The Court decided adversely to the Commission. In its opinion it declared that:

"The common carrier cannot be required to ignore or overcome existing differences in the transportation facilities of different localities, created, not by its own arbitrary action, but by nature or by enterprises beyond its control."

The defendant before the court contended that the Commission's findings of fact did not accurately portray the real conditions which controlled the transportation to Los Angeles and San Bernardino, respectively, and the court declared that with respect to the water competition at Los Angeles, the facts were "widely different from those set out in the report of the Commission." After quoting at length testimony which clearly establishes the existence of actual water competition, of controlling force and amount, at Los Angeles, the court said:

"The testimony in the case is altogether too voluminous to refer to in detail, but I think it is safe to say, generally, that it shows that the water carriers mentioned are now, and that some of them for years past have been, competing with the overland railroads for the carriage of general freight, including the commodities mentioned in the petition, from the cities and country east of the Missouri river to the Pacific coast, including the city of Los Angeles; that they are and have been actively engaged in such transportation, soliciting the freight and carrying what they can get; and that they actually do carry an important part of many of the commodities mentioned in the petition.

"The fact that such means of transportation actually exist, and is actually and actively seeking the traffic, constitutes competition, and was doubtless one of the most important factors in making Los Angeles a terminal point. Not only does the evidence show that such water competition exists, but it shows that the shipments by water are increasing; and a number of the witnesses testify that, in the event the all-rail rates should be increased from what they are now, it would result in much larger shipments by water, both in quantity and kind. For the reason stated I am of the opinion that the circumstances and conditions attending the transportation of the commodities in question to Los Angeles and San Bernardino are essentially dissimilar, and, therefore, that the long and short-haul clause of the Interstate Commerce act does not apply to the case. As has been said, it is not claimed that the rates to San Bernardino are otherwise unjust or unreasonable."

The Coxe Case.*

*"The Commission's estimate * * * rests upon an erroneous principle and is unreliable."—Decision of the Circuit Court in this case.*

The object of the original complaint in this case was to secure a reduction in the charges for carrying anthracite from the mines owned by the complainant to Perth Amboy, New Jersey, the tide-water point reached by the defendant. The Commission ordered a reduction and afterward petitioned the Circuit Court to enforce its order. After an adverse decision by the Circuit Court the Commission appealed to the Circuit Court of Appeals, but subsequently withdrew its appeal. In denying the request of the Commission the Circuit Court, in an opinion by Judge Acheson, said:

"The Commission found, and in its report states, that the operating cost of carrying a ton of anthracite coal from the Lehigh anthracite regions to Perth Amboy was eighty-five cents. This conclusion the Commission deduced from the

* Coxe Brothers & Company *vs.* The Lehigh Valley Railroad Company Interstate Commerce Commission (4 I. C. C. Rep. 535), decided March 13, 1891. Interstate Commerce Commission *vs.* Lehigh Valley Railroad Company; Circuit Court, Eastern District of Pennsylvania (74 Fed. Rep. 784), decided May 11, 1896. Interstate Commerce Commission, Appellant, *vs.* Lehigh Valley Railroad Company; Circuit Court of Appeals, Third Circuit (32 Fed. Rep. 1002), minute of withdrawal of suit on motion of appellant.

Lehigh Valley Railroad Company's annual report for the year ending November 30, 1887. In the report of the Commission are the following statements and tables: 'The business; receipts, with sources from which derived; expenses, and on what account incurred,—for year ending November 30, 1887, as appears from the annual report of said railroad company, were:

	Carried one mile.	Gross receipts.	Expenses.	Net receipts.
Coal, tons	613,889,171.02	$6,165,411 29	$3,431,609 83	$2,733,801 46
Other freight, tons	253,564,921.56	2,430,761 13	1,902,595 93	528,165 20
Passenger, express and mail	44,512,264.10	1,122,833 65	808,190 49	314,693 16
Totals		$9,719,056 07	$6,142,396 25	$3,567,659 82

"'From the above reported facts it appears that the ton-mile receipts, expenses, and profits, or net receipts, for the year 1887, were on:

	Gross receipts per ton per mile, mills.	Expenses per ton per mile, mills.	Net receipts per ton per mile, mills.
Coal	12.00	6.67	5.32
General freight	9.58	7.50	2.08

"'The operating expenses for the transportation of all freight are sixty-three per cent of the reported operating income, while the cost of transporting coal is but fifty-six per cent of the income from coal, as appears from the said annual report of 1887. The estimated cost of carrying coal from the Lehigh and Mahanoy regions to Perth Amboy, based on said report, is eighty-five cents per ton, which, for

the group or average distance of 149 miles, is nearly six mills per ton per mile, taking the tide coal as an average; some being carried to other points at lower, and some at higher, rates.'

"Now, certainly, there is no statements in the railroad company's report to the effect that the cost of carrying coal from the Lehigh and Mahanoy regions to Perth Amboy was eighty-five cents per ton. That is the estimate of the Commission, and it purports to rest upon the report of the railroad company for the year 1887. That report shows that the gross receipts from all coal carried by the defendant during the year averaged twelve mills per ton per mile, and that the average cost of carrying each ton of coal per mile was 6.67 mills. Upon the basis of this average cost per mile, namely, 6.67 mills, the cost of transporting a ton of coal from the Lehigh and Mahanoy regions to Perth Amboy (149 miles) would be 99.38 cents. By what method, then, did the Commission proceed in making its estimate? No satisfactory answer to this inquiry is to be found in the report of the Commission. The counsel for the Commission, in a supplemental brief furnished the court since the hearing of the case, makes this explanation: 'The correct method of obtaining such cost of transportation, and the method which the Commission has again stated, since the argument, to have been the one adopted by it, is shown as follows.'

"The counsel then states that the Commission found from the railroad company's report for 1887, that the operating expense on all coal carried from all points of shipment to all destinations during that year was about fifty-six per

cent of the gross coal receipts; that the Commission ascertained that the average rate charged by the company for carrying the larger sizes of coal from the Lehigh and Mahanoy mines to Perth Amboy in 1887 was $1.54 per ton, and that the average rate charged upon the pea, buckwheat, and culm was $1.36 per ton; that the Commission estimated that 75 per cent of this tonnage took the $1.54 average rate, and that twenty-five per cent thereof took the $1.36 average rate, and hence that the average revenue per ton from this tidal coal was $1.495. The counsel's brief then proceeds thus:

"'The fair average gross receipts per ton actually obtained by the company in 1887 for carrying anthracite coal from the Lehigh and Mahanoy mines to Perth Amboy having thus been found to be $1.495 per ton, and it having also been ascertained, as above shown, that nearly fifty-six per cent. of the company's gross revenue from coal was absorbed by the cost of carriage, it follows that fifty-six per cent. of the average rate of $1.495 per ton would furnish 83.7 cents as the basis on which to estimate the cost of carrying a ton from said coal regions to Perth Amboy in 1887. The Commission, to be entirely safe, increased this by 1.3 cents, and placed its estimate of the cost of carriage at eighty-five cents per ton. The calculation above described applies the coefficient of expenses on coal traffic (56 per cent of gross receipts) directly to the traffic in question and the receipts actually received for its transportation.'

"If the explanation thus given by the counsel for the Commission is a correct statement of the method pursued by

the Commission in making its estimate of eighty-five cents, then, in our judgment, that method is without justification. For having adopted an estimated average rate of revenue, namely, $1.495, from each ton of coal carried over the 149 miles from the Lehigh and Mahanoy regions to Perth Amboy, the Commission assumed that the expenses of the transportation of coal over this particular branch of the defendant's railroad system was necessarily only the average cost of the carriage of all coal upon the defendant's entire system. The assumption which thus underlies the Commission's estimate is unwarrantable. Merely because the cost of carriage of all coal upon the defendant's entire railroad system from all points of shipment to all destinations was fifty-six per cent of the gross receipts from all coal, is no reason for concluding that upon a particular line or part of the system the cost of carriage bears the same ratio to the coal receipts from that particular line or part. The railroad company's report for 1887, upon which the Commission based its estimate, does not furnish the data by which the actual cost of carrying coal from the Lehigh and Mahanoy mines to Perth Amboy can be ascertained. The Commission, therefore, resorted to an estimate of the carrying cost. That estimate, however, as we have seen, rests upon an erroneous principle, and is unreliable. Hence the order based thereon cannot be sustained, and is not to be judicially enforced.

"We have only to add that the evidence before us is quite convincing that the actual cost of transporting coal from the Lehigh and Mahanoy regions to Perth Amboy was and is considerably more than eighty-five cents per ton."

The Social Circle Case.*

"If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable."—Decision of the Supreme Court in this case.

This case is especially interesting because it is the only one in which any part of an order of the Interstate Commerce Commission has received the approval of the United States Supreme Court. The original complaint involved the rate on buggies, carriages, and freight taking "first class" rates from Cincinnati to Social Circle, Georgia, and from the same point to Atlanta. The complaint concerning the rate to Social Circle involved the Fourth section, or long and short haul clause, of the law, and the facts showed that while the rate to Social Circle was $1.37 per hundred pounds

* The James & Mayer Buggy Company *vs.* The Cincinnati, New Orleans & Texas Pacific Railway Company, The Western & Atlantic Railroad Company, and The Georgia Railroad Company; Interstate Commerce Commission (4 I. C. C. Rep. 744), decided June 29, 1891. Interstate Commerce Commission *vs.* Same Defendants; Circuit Court, Northern District of Georgia (56 Fed. Rep. 925), decided June 3, 1893. Interstate Commerce Commission, Appellant, *vs.* Same Defendants; Circuit Court of Appeals, Fifth Circuit (4 Inter. Com. Rep. 582), decided May 29, 1894. Cincinnati, New Orleans & Texas Pacific Railway Company *et al.*, Appellants, *vs.* Interstate Commerce Commission; Interstate Commerce Commission, Appellant, *vs.* Cincinnati. New Orleans & Texas Pacific; Supreme Court (162 U. S. 184), decided March 30, 1896.

the same kind of freight was carried through Social Circle to Augusta for $1.07 per one hundred pounds. The Atlanta rate was alleged to be unjust in comparison with that to Augusta because both were the same while the route through Atlanta to Augusta was 171 miles longer than the route to Atlanta. On both points the Commission decided in favor of the complainant. The defendants were ordered to "cease and desist" from charging more from Cincinnati to Social Circle than to Augusta and from charging more than $1.00 per hundred pounds to Atlanta.

The Circuit Court refused to enforce any part of this order and dismissed the petition of the Commission. Its refusal, so far as concerns the Social Circle rate, was based wholly upon its interpretation of the meaning of the word "line" in the Interstate Commerce law, and the decision contains no statement of the views of the court as to the substantial justice of charging more to Social Circle than to Augusta. As the order of the Commission so far as it affected the Social Circle rate was subsequently approved and its enforcement decreed by the Supreme Court, it is not necessary now to consider that question. On the point of the reasonableness of the Atlanta rate all of the courts which passed upon the case disagreed with the Commission. The report of the latter indicates that it did not have a great deal of evidence on which to decide this point. The following is an extract:

"The only testimony offered or heard as to the reasonableness of the rate to Atlanta in question was that of the vice-president of the Cincinnati, New Orleans & Texas Pacific Company, whose deposition was taken at the instance of said company. The witness testified that he had been in the railroad service about twenty-six years, and had much to do with rates during all that time, and that he considered $1.01 per 100 pounds, in less than car loads, a reasonable rate on first-class freight from Cincinnati, Ohio, to Atlanta, Georgia. This statement or estimate of the rate from Cincinnati to Atlanta, we believe, is fully as high as it may reasonably be, if not higher than it should be; but without more thorough investigation than it is now practicable to make we do not feel justified in determining upon a more moderate rate than $1.00 per 100 pounds of first-class freight in less than car loads. The rate on this freight from Cincinnati to Birmingham, Alabama, is 89 cents, as compared with $1.07 to Atlanta; the distance being substantially the same. There is apparently nothing in the nature and character of the service to justify such difference, or, in fact, to warrant any substantial variance in the Atlanta and Birmingham rates from Cincinnati."

Discussing the foregoing the opinion of the Circuit Court says:

"It will be perceived that the only finding of fact was the testimony of one witness that the rate of $1.01 was reasonable, and the comparative rate to Birmingham, on which

the Commission seems to lay stress. It seems that for a short time at least a rate of $1.01 was in force from Cincinnati to Atlanta, and that it was as to this rate that the testimony of one witness before the Commission was taken. It appears in evidence here that the rate from Cincinnati to Atlanta, in 1879, was $1.39, and that afterwards it was $1.10, and subsequently $1.07, except, perhaps, as stated, it was for a short time $1.01. As to the rate to Birmingham, there is evidence before the court, which was evidently not before the Commission, namely, that the rate from Cincinnati to Birmingham, which seems previously to have been $1.08, was forced down to eighty-nine cents by the building of the Kansas City, Memphis & Birmingham railroad, which new road caused the establishment of a rate of seventy-five cents from Memphis to Birmingham; and by reason of water routes to the northwest such competition was brought about that the present rate of eighty-nine cents from Cincinnati to Birmingham was the result. It seems to be no sufficient reason to determine the rate from Cincinnati to Atlanta unreasonable because of the lower rate to Birmingham, when such lower rate is caused by conditions which do not operate as to Atlanta. * * *

"The conclusion of the Commission should undoubtedly be considered in connection with the facts on which that conclusion was based; and the principal fact which seems to have been in the mind of the Commission is satisfactorily explained here, as has been indicated. The evidence offered here on behalf of the railroads, is, in the opinion of the court, sufficient to overcome any prima facie case that may have been made by the findings of the Commission.

On the whole testimony, as now before the court, it is not believed that the Commission would have found the rate in question to be unreasonable."

The Circuit Court of Appeals reversed the decision of the Circuit Court and ordered the enforcement of the Commission's order relating to the Social Circle rate, but denied its petition as to the Atlanta rate. Both parties appealed to the Supreme Court, the Commission asking for the enforcement of its order as to the Atlanta rate, the railways seeking the reversal of the decree of the Circuit Court of Appeals as to the Social Circle rate.

The Supreme Court sustained the Circuit Court of Appeals on both points in a most notable decision, written by Judge Shiras, in which it declared that the Commission had not received from Congress the power to fix or make rates. This decision was rendered on March 30, 1896. The position taken by the Supreme Court in regard to the Atlanta rate is shown by the following:

"As already stated, the Circuit Court of Appeals adopted the views of the Circuit Court, in respect to the reasonableness of the rate charged on first-class freight carried on defendant's line from Cincinnati to Atlanta; and as both courts found the existing rate to have been reasonable, we do not feel disposed to review their finding on that matter of fact."

Cartage Case.*

"Not in fact the complaint of a shipper but of a rival and competing line."—Dissenting opinion of Commissioner Bragg.

The complainants in this case were engaged in business at Ionia, Michigan, which is a point on the defendant's line between Detroit and Grand Rapids. The substance of their complaint was that the defendant supplied free cartage of freight between its depot in Grand Rapids and the stores, warehouses, etc., of its patrons, while the consignees and shippers at Ionia were required to perform their own cartage. The following stipulation of fact, among others, was agreed to by both parties before the Commission:

"That the respondent provides, at its own expense, drays, carts and trucks at the city of Grand Rapids for the service of transporting merchandise and freight generally,

* Mary O. Stone and Thomas Carten *vs.* The Detroit, Grand Haven and Milwaukee Railway Compaay; Interstate Commerce Commission (3 I. C. C. Rep. 613), decided April 26, 1890. Interstate Commerce Commission *vs.* Detroit, Grand Haven and Milwaukee Railway Company; Circuit Court, Western District of Michigan, Southern Division (57 Fed. Rep. 1005), decided October 6, 1893. Detroit, Grand Haven & Milwaukee Railway Company, Appellant, *vs.* Interstate Commerce Commission. Circuit Court of Appeals, Sixth Circuit (74 Fed. Rep. 803), decided April 14, 1896. Interstate Commerce Commission, Appellant, *vs.* Detroit, Grand Haven and Milwaukee Railway Company; Supreme Court (167 U. S. 633), decided May 24, 1897.

as well as merchandise and freight consigned from Philadelphia, New York, Boston, and points east of Detroit, between its station at Grand Rapids and the places of business of merchants, traders, and other patrons of its road at that place, which service it performs without additional charge to the owner or shipper of property on account thereof; that this service is not furnished to complainants or other merchants, traders, and patrons of its road at the city of Ionia; that this service at Grand Rapids has been openly and notoriously rendered for a long period of time, to wit, for twenty-five years and upwards; that its station at the said city of Grand Rapids is within the corporate limits thereof, and is on an average one-and-a-quarter miles from the business sections of said city where the traffic of the places tributary to respondent's road originates and terminates, while respondent's station for receipting and discharging freight and property at the city of Ionia is not to exceed an eighth of a mile from the business centre of said city; that at the city of Grand Rapids there are two other railroads, the Michigan Central Railroad and the Grand Rapids, Lansing and Detroit Railroad, both of which are immediately and directly in competition with respondent's road for the business of Grand Rapids; that the stations of both of said roads for receiving and discharging freight and property at Grand Rapids, are near the business centre of said city, requiring only short haul to and from their stations, on an average about one-quarter of a mile; that respondent did the carting of freight to and from its station at Grand Rapids, substantially in the same manner as at present, long prior to the time when either said Michigan

Central or Grand Rapids, Lansing and Detroit railroads was constructed to that place."

The schedule rates to Ionia and Grand Rapids were the same.

Three of the five members of the Commission took the view that to supply free cartage at Grand Rapids and not at Ionia, was illegal. They regarded it as an illegal concession from the published rate, as an unjust discrimination in favor of Grand Rapids and as in violation of the long and short haul clause. Commissioner Veazey did not sit in the case and Commissioner Bragg wrote an opinion strongly dissenting from the view of the majority. The latter said in part:

"If the construction of the statute reached in this proceeding by the majority of the Commission is to be adopted as the rule on this subject, the point of receipt or delivery of freight in every case may become material in determining the question of a violation of section four; or of an unlawful preference; or of an unreasonable or unjust prejudice; and towns where the station is comparatively distant may insist that other towns beyond them on the same line cannot enjoy the advantage of stations much nearer unless a corresponding change in rates is made because drayage is materially less. It will then logically follow and be next in order for us to prescribe what must be the average distance of a depot from the business portion of a town or city in order to avoid unjust discrimination, or unlawful prefer-

ence, or undue or unreasonable prejudice to the business of such town or city. * * *

"* * * As incident to its business, a carrier, like the defendant, has a right to engage in the cartage of goods to and from its depot. It may make a reasonable charge for this service; but if it does it must charge all alike for the same service at the same depot. In the accommodation of its traffic and in the exigencies of its business it may, as a transportation expense, make no charge for such service; but if it does this it must treat all alike at that depot and must not show preference to some over others in rendering the same service. * * * A depot warehouse is a convenience of which it may avail itself or not as it may determine the accommodation of its traffic requires at a particular station, or it may make personal delivery of freight to every consignee of that station, or receive at his place of business freight from every shipper at that station, provided in doing so it treats all fairly and alike and makes no extortionate charge for the service rendered. * * *

"It seems that for about three months the Michigan Central Railroad Company and the Detroit, Lansing and Northern Railroad Company transported their freight to and from Grand Rapids in the same manner that it is now complained by the Michigan Central Railroad Company that it is done by the defendant. But they abandoned this about twelve months ago, for what cause is not shown; and then petitioners were procured to make this complaint by the Michigan Central Railroad Company. By this method of business at Grand Rapids no injury or prejudice is shown to have been done to the business of Ionia and no shipper

or consignee at Ionia complains of it or demands that the defendant shall do its business in this way at Ionia. This complaint is in substance and in fact the complaint of the Michigan Central Railroad Company, a rival and competitor of the defendant for the business of Grand Rapids, and the purpose of it is manifest; and this is stated in no spirit of criticism or censure, but as a fact that is deemed of some importance in the case, for it shows that it is not in fact the complaint of a shipper but of a rival and competing line, who alone is to be benefited by a decision against the defendant." * * *

"A delivery or receipt of freight such as is here made by the defendant at Grand Rapids is made by railway carriers at other exceptional stations in the State of Michigan, and by railway carriers at exceptional stations in other States of the Union. Its origin, as a rule, is found in the fact that one carrier is unable to locate its depot otherwise than at a long distance from the business portion of a city or town, while other carriers have succeeded in establishing their depots near to or in the business portion of such city, or town. The carrier whose depot is thus located at the greater distance resorts to this expensive method of transporting its traffic and equalizing its terminal facilities, as far as this may be done in this manner, with those of its competitors in transporting freight to and from that town or city, as the case may be. Ordinarily other carriers adopt the same method of doing business at such city or town by way of competition. * * *

"Actual and fair competition between carriers for transportation traffic was one of the chief objects aimed at by

Congress in the enactment of the Act to regulate commerce. This is apparent not only from the debates but from the section against pooling—section 5 of the Act. This view of the statute has been repeatedly recognized by the Interstate Commerce Commission in its annual reports and in its decisions. Where rival carriers are engaged in active competition for the business of a common point upon their lines, and of necessity make their transportation rates the same upon freight to and from that point, it is wholly immaterial upon a question of the justice and reasonableness of such rates, or whether they comply with the law as to the long-and-short-haul clause, that it costs one of them more than it does the other to transport the freight, or to receive or deliver it, for in every such instance that is more or less the case. In disposing of such a case the Commission would enter into no such question as that. The two cents per hundred pounds estimated as being expended by the defendant under the circumstances and conditions shown by the evidence in transporting freight to and from Grand Rapids is nothing more nor less than an expenditure of that amount in the cost it incurs in the transportation of its freight. Similar instances may be found in most, if not all, of the States of the American Union, in exceptional cases. The expense incurred in such a case is met by the transportation rate charged, and is covered by that rate. A blow that strikes down the benefits of such competition to the business of Grand Rapids, and to the business of the defendant, and which will benefit alone its rival and competing lines at Grand Rapids, without conferring any benefit whatever

upon Ionia, and upon the grounds here claimed, is a result that, in my humble opinion, is not sanctioned by the Act to regulate commerce. The attempt to justify it on the ground that it is the extirpation of either an old or a young abuse is not warranted by the evidence in this proceeding and the statute we are required to administer."

The Circuit Court directed the enforcement of the Commission's order although Judge Severens wrote a dissenting opinion, and Judge Taft, in delivering the opinion of the Court referred to the admission of counsel for the complainants before the Commission that his clients—

"had no real grievance, but were instigated to their prosecution by a competitor of the defendant, the Michigan Central Railway, which is paying the expenses of the litigation."

Judge Severens said, among other things, of the argument which would sustain the Commission's order:

"The argument appears to me to rest upon unsubstantial grounds which have been swept away by the rulings of the Commission itself upon constructions of the law which have been acquiesced in as just and reasonable."

In overruling the Circuit Court and refusing to enforce the order of the Commission, the Circuit Court of Appeals left no room for doubt as to its opinion concerning the question here under consideration, which is whether the final

determination of the case was in the direction of substantial justice. The concluding sentence of the opinion, written by Judge Hammond, referring to the order of the Commission reads as follows:

"In any view, therefore, either because this order was not according to the right of the case, as we understand it, or because it directed an improper mode of redressing the abuse, if any existed, the decree must be reversed, and the cause remanded to the Circuit Court, with directions to dismiss the petition, with costs."

Elsewhere in the opinion, which is long, exhaustive and able, the Court said:

"We have come to the conclusion that, so looking at the facts and circumstances of this case, none of the sections of this Act have been violated by the fact that the railroad company collects and delivers at the premises of the consignors and consignees at Grand Rapids, and does not collect and deliver at the premises of the consignors and consignees at Ionia. The two localities are widely separated in distance, and so related to the general trade with which this transportation traffic is concerned that they are not at all competitors with each other in that trade. It is found as a fact in this case that there is 'but slight competition' between them, and we take it, for practical purposes, that there is none. This extra accessorial service which is rendered at Grand Rapids could not well be an undue and unreasonable advantage or preference of a rival in trade,

when there is no competition in trade and such rivalry does not in fact exist. * * *

"Our law affords abundant instances of its tender regard of the established customs of the people. We think that the consequences of the deprivation to the people of Grand Rapids of this custom may be held to be one of the circumstances which may relieve a carrier from the statutory obligation of equal facilities elsewhere, to say nothing of injury to itself. There having been no such long-established custom at Ionia, and their station having been located much nearer to the business portion of the town than at Grand Rapids, exhibits a dissimilarity of circumstances between the two places. * * *

"Finally we have a circumstance not more important than those to which we have adverted, but more striking in its appearance of importance, and that is the competition of rival carriers at Grand Rapids for the same traffic. It needs nothing more than the mere suggestion of the facts themselves to display the disadvantage there would be to this company if it remained with its station houses in the suburbs of Grand Rapids, without the privilege of collecting and delivering by carts, while its rivals had station houses located immediately in the business centre of the city. It does not, then, become a matter of competition and business rivalry, but substantially of the annihilation of the business of this company at that point, or, more intolerably, a denial to this company of the right to compete with its rivals as now it may. Its only possible remedy would be the building of its tracks into the city, at the cost we have suggested. There is no such condition or circumstance as this at Ionia. * * *

"Now, then, the only effect of the fact of competition, in such a state of things as that we have had at Grand Rapids, is that this carrier loses the traffic entirely, not because it cannot make, under the statute, a lesser rate to shippers on its lines than at Ionia, the shorter haul, but because it cannot afford them equal facilities of access. The statute cannot be violated merely to get traffic from a rival by giving lesser rates than to people more favorably situated; cannot bleed Ionia to make up for the misfortunes of competition at Grand Rapids, for Congress has prohibited such a practice, but it has not prohibited the carrier from resorting to a cheaper method of securing access at Grand Rapids than one more costly. It has not prohibited this company from entering into competition with its rivals by some mode of access to shippers at Grand Rapids, and why not this mode? It has not been prohibited from extending its lines and placing its station houses alongside of those of its rivals, and why should it be prohibited from sending its carts there? It has not, we think, and these prohibitions of the statute should not be allowed to so operate by mere construction of words. * * *

"The whole of these dissimilarities of condition and circumstance, as between Grand Rapids and Ionia, whether of competition, or what not, may, in our view, be summed up in the statement that this particular carrier cannot have access to the traffic at Grand Rapids without this cartage service that is complained of by Ionia, while at that station it can have access to the relatively insignificant traffic there given to the carrier without it."

The Supreme Court unanimously affirmed the conclusions reached by the Circuit Court of Appeals, but the opinion, by Judge Shiras, deals almost exclusively with questions of a purely legal character. It is noted, however that the practice of paying cartage at Grand Rapids had been "openly and notoriously" followed for twenty-five years and that in the case in hand there was no complaint "by any resident at Grand Rapids."

Orange Rates Case.*

"Building up indirectly and by implication a power which is not in terms granted."—Decision of the Supreme Court in the "Freight Bureau" cases.

This is the second of the cases, to be taken up in this memorandum, which were finally determined upon the interpretation of the law fixed by the Supreme Court in declaring that Congress has not conferred rate-making power upon the Commission. It was decided immediately

* The Railroad Commission of Florida *vs.* The Savannah, Florida and Western Railway Company *et al.;* Interstate Commerce Commission (5 I. C. C. Rep. 13, and application for re-hearing denied, 5 I. C. C. Rep. 136), decided October 29, 1891. Florida Fruit Exchange *vs.* Same defendants; Circuit Court, Northern District of Florida (4 Inter. Com. Rep. 400), decided December 1, 1892. Savannah, Florida and Western Railway Company *et al.*, Appellants, *vs.* Florida Fruit Exchange; Circuit Court of Appeals, Fifth Circuit (4 Inter. Com. Rep. 589), decided May 29, 1894. Savannah, Florida and Western Railway Company *et al.*, Appellants, *vs.* Florida Fruit Exchange; Supreme Court (167 U. S. 512), decided May 24, 1897.

after the case of the Commission *vs.* The Cincinnati, New Orleans and Texas Pacific (167 U. S. 479) popularly known as the "Freight Bureau" case (see page 111), in which the Supreme Court re-affirmed and explained the doctrine of the "Social Circle" case (162 U. S. 184). Judge Swayne, in the Circuit Court, and Judges Pardee and McCormick, in the Circuit Court of Appeals, decided in favor of the Commission. In neither case, however, is there a reported opinion and the Supreme Court merely entered a statement that the decision was controlled by that in the "Freight Bureau" case. It is not possible, therefore, to draw from the expressions of the courts any conclusions upon the question here under consideration.

Import Rates Case.*

*"The effort of the Commission, by a rigid general order, to deprive the inland consumers of the advantage of through rates * * * seems to create the very mischief which it was one of the objects of the Act to remedy."—Decision of the Supreme Court in this case.*

* The New York Board of Trade and Transportation *et al. vs.* The Pennsylvania Railroad Company *et al.;* Interstate Commerce Commission (4 I. C. C. Rep. 447), decided January 29, 1891. Interstate Commerce Commission *vs.* Texas Pacific Railway Company; Circuit Court, Southern District of New York (52 Fed. Rep. 187), decided October 4, 1892. Interstate Commerce Commission *vs.* Texas and Pacific Railway Company; Circuit Court of Appeals, Second Circuit (57 Fed. Rep. 948), decided October 17, 1893. Texas and Pacific Railway Company, Appellant, *vs.* Interstate Commerce Commission; Supreme Court (162 U. S. 197), decided March 30, 1896.

The complaint in this case was that the defendants charged lower rates from American ports to interior points of destination, on traffic originating in Europe, than were charged at the same time on similar traffic originating at the same American ports and carried by the same routes to the same destinations. The question, therefore, was whether the fact of foreign origin constituted a dissimilar circumstance or condition, in the contemplation of the Act to regulate commerce, and thus justified the difference in charges. The Commission held, in substance, that while the law confers authority over import traffic that authority does not extend to the regulation of the rates charged from the foreign port to the American port, but attaches solely to the inland carriage and that, as to the inland carriage, the law does not recognize any dissimilarity of conditions growing out of the foreign origin of the traffic. In other words both imported and domestic traffic, regardless of whether the former is or is not carried on a through bill-of-lading from the foreign port of origin to the American interior point of destination, must be carried from American ports to inland points at equal rates. As it appeared from the record that several of the carriers who were parties defendant before the Commission, had ceased, prior to the Commission's decision, to charge less for import traffic, the case was dismissed as to all such carriers and the final order was directed against only The Texas & Pacific, Southern Pacific, Northern Pacific,

Lehigh Valley, Canadian Pacific, and a few other railways. Subsequently proceedings were begun by the Interstate Commerce Commission to enforce its order against the Texas and Pacific Railway. A decree requiring obedience to the Commission's order was issued by the Circuit Court and affirmed, on appeal, by the Circuit Court of Appeals, although the latter apparently doubted the validity of the Commission's conclusion that—

"foreign and home merchandise, under the operation of the statute, when handled and transported by interstate carriers, engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, rates, charges, and treatment for similar services rendered."

Upon this point Judge Shipman, in rendering the opinion of the Circuit Court of Appeals, said:

"This rule, having been founded upon a construction of the statute, is a very broad one. It is applicable to all the foreign circumstances and conditions which affect rates, and the question whether it must be universally applied without regard to any circumstances which may exist in a foreign country, and whether dissimilarities which have a foreign origin are to be excluded from consideration under the operation of the statue, is an exceedingly important one, whose ultimate decision may have a wider influence upon the interstate commerce of the country than we can foresee. This legal question was not discussed in the export rate case, which was treated 'as one of practical policy.'

We are not disposed to pass authoritatively upon this question, except in a case which demands it, and in which the effect of this construction of the statute is naturally the subject of discussion. This petition presents a question of narrow limits, which relates only to the validity of the order so far forth as it concerns the conduct of the defendant in its joint rates for transportation of imported traffic from New Orleans to San Francisco, and is whether these rates subject domestic traffic between the same points to an undue disadvantage."

The Supreme Court reversed the action of the lower Federal courts and remanded the case to the Circuit Court with directions to dismiss the Commission's petition. The opinion of the Supreme Court was prepared by Judge Shiras. The conclusions of the Commission are criticised on the ground that:

"The Commission justified its action wholly upon the construction put by it on the Act to regulate commerce, as forbidding the Commission to consider the 'circumstances and conditions' attendant upon the foreign traffic as such 'circumstances and conditions' as they are directed in the Act to consider. The Commission thought it was constrained by the Act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its *pro rata* share of such rates, was an act of 'unjust discrimination,' within the meaning of the Act."

Continuing, the Court said that in construing the Act as indicated by the foregoing the Commission erred and, in another place, it said that "it would be difficult to use language more unmistakably signifying" the precise opposite of the construction followed by the Commission. In one paragraph the court characterized the order of the Commission as an effort to deprive inland consumers of the advantage of through rates, saying:

"The effort of the Commission, by a rigid general order, to deprive the inland consumers of the advantage of through rates, and to thus give an advantage to the traders and manufacturers of the large seaboard cities, seems to create the very mischief which it was one of the objects of the Act to remedy."

The broad view of the Supreme Court, throughout this decision, is in striking contrast to the narrow and rigid interpretation of the law adopted by the Commission. Witness the following from the Court:

"As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the Act to justify such a supposition.

"So far from finding such language, we read the Act in question to direct the Commission, when asked to find a

common carrier guilty of a disregard of the Act, to take into consideration all the facts of the given case—among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried; and that the attention of the Commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered; but we cannot concede that the Commission is shut up by the terms of this Act to solely regard the complaints of one class of the community. We think that Congress has here pointed out that, in considering questions of this sort, the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public."

The absence of any complaint from the citizens of New Orleans, the point at which the Texas and Pacific Railway, the only defendant named in the proceedings in the courts, received the traffic in question, was noted by the Supreme

Court, as well as the equally significant absence of such complaint from the communities to which the traffic was destined. On this point the Court said:

"As we have already stated, the Commission did not charge or find that the local rates charged by the defendant company were unreasonable, nor did they find that any complaint was made by the city of New Orleans, or by any person or organization there doing business. Much less did they find that any complaint was made by the localities to which this traffic was carried, or that any cause for such complaint existed."

In other words, this case, like many of those herein discussed, originated solely in the desire of one or more of several competitors to utilize the Interstate Commerce law and the Commission as a means of crippling a rival or rivals. Again, indicating its broad view of questions arising under the Interstate Commerce law, the Supreme Court said:

"The conclusions that we draw from the history and language of the Act, and from the decisions of our own and the English courts, are mainly these: That the purpose of the Act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations. That, in passing upon questions arising under the Act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is em-

powered to fully consider all the circumstances and conditions that reasonably apply to the situation and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered. That if the Commission, instead of confining its action to redressing, on complaint made by some particular person, firm, corporation, or locality, some specific disregard by common carriers of provisions of the Act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the Act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country."

The opinion refers to the passage, already quoted, from the decision of the Circuit Court of Appeals, and, speaking of it as an intimation of "dissent from," or at least of "distrust of" the view of the Commission, declares that:

"If the Circuit Court of Appeals were of opinion that the Commission in making its order had misconceived the extent of its powers, and if the Circuit Court had erred in affirming the validity of an order made under such misconception, the duty of the Circuit Court of Appeals was to reverse the decree, set aside the order, and remand the cause to the Commission in order that it might, if it saw fit, proceed therein according to law."

Finally the Supreme Court said:

"The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the court in finding that such disparity constituted an undue discrimination—much less did it justify the court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm, or corporation complaining that he or they had been aggrieved by such disparity."

Delaware Grange Case.*

"It could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce."—Decision of the Supreme Court in the "Import Rates" case.

The complaint in this case related to the charges for carrying the perishable products of the truck farms and market gardens located on the peninsula occupied by the State of Delaware and a portion of the State of Maryland. It was charged that these rates were unreasonable in themselves and also in violation of the long and short haul section of the law, as they were higher than those over the same route from Norfolk and vicinity. With regard to some of the rates complained of the Commission decided in favor of the complainants. Suit to enforce its order was begun and decided adversely to the Commission. The case does not appear to have been reported and the facts have been obtained for this memorandum from the following paragraph, which is to be found on page 29 of the Seventh Annual (1893) Report of the Commission:

"The case pending against the New York, Philadelphia and Norfolk Railroad Company and the Pennsylvania Rail-

* The Delaware State Grange of the Patrons of Husbandry *vs.* The New York, Philadelphia and Norfolk Railroad Company *et al.;* Interstate Commerce Commission (4 I. C. C. Rep. 588), decided April 13, 1891.

road Company and subsidiary roads was heard during the past year and decided adversely to the Commission. The case originated upon the complaint of the Delaware State Grange, and proceeded upon the theory that the rates on farm produce from the Maryland and Virginia peninsula to Philadelphia and New York were unreasonable in themselves, and particularly as compared with the rates on the same articles from Norfolk. The decision of the Commission recognized the very serious influence exerted by the near presence of active water competition, and only required the adjustment of rates as to some particulars where the rates seemed to be upon an illogical basis. Parties in interest, desiring to review the subject, employed a counsel and the Commission consented to the bringing of the suit to enforce the decision, which resulted as stated, and no appeal has been taken."

Nashville Coal Case.*

"The order is without precedent or analogy in court judgments or decrees."—Decision of the Circuit Court in this case.

The Commission's order in this case was, in substance, that while the rate on coal from the mines on the Henderson and Owensboro divisions of the Louisville and Nashville

* In the matter of alleged unlawful charges for the Transportation of Coal by the Louisville and Nashville Railroad Company; Interstate Commerce Commission (5 I. C. C. Rep. 466), decided November 17, 1892; Interstate Commerce Commission *vs.* Louisville and Nashville Railroad Company; Circuit Court, Middle District of Tennessee (73 Feb. Rep. 409), decided April 17, 1896.

Railroad to Memphis was $1.40 per ton, the rate from the same points to Nashville on "run of mines, nut and slack" coal should not exceed $1.00 and that on "screened" coal should not exceed $1.15 per ton, and that any reduction in the rate to Memphis should be accompanied by a proportionate reduction in that to Nashville. The opinion of the Commission says:

"At present there is a uniform rate from the western Kentucky mines to Nashville of $1.00 per ton to all persons, on the kinds of coal known as 'run of mines, nut and slack,' and this rate does not vary with the season. On 'screened coal' the rate is $1.15 per ton during the period from April 1st to September 1st, while for the remainder of the year, viz: from September 1st to April 1st, it has been fixed at $1.40 per ton. * * *

"The amount of the difference made at different seasons of the year, cannot, however, be justified either by the evidence in this case or by the custom of the roads * * * there seems no good reason why the practice should longer exist."

It is obvious from the foregoing, that the effect of the Commission's order would be the enforcement of the rule, suggested in the last paragraph of the quotation, that rates should not vary with the season. The Commission appealed to the Circuit Court for a decree enforcing its order, and its petition was denied. The decision of the Court characterizes the order of the Commission as "without

precedent or analogy in court judgments or decrees," and summarizes the reasons impelling a refusal to grant the desired decree as follows:

"There is in the case, in my opinion, no discrimination under section 2, and no undue advantage under section 3, to the Memphis trader as against the Nashville trader; and the proposition that the railroad was without power to make a difference in the summer and winter rates was, I think, erroneous; and whether or not, the Nashville rate, considered upon its own merits, is unjust and unreasonably high, was not inquired about nor decided by the Commission."

Concerning the suggestion that the railway ought not to be permitted to continue the practice of making lower rates to Nashville in summer than in winter the Court said:

"The Commission based its ruling in part upon the ground that the defendant railway company was without right to make any difference between what may be called the summer and winter rates, and the Commission required the company to reduce its winter rate so as to conform to the summer rate, and make that uniform the year round, and this brings up the question whether its opinion on that point was sound. Neither the Commission in its report, nor its able counsel in the argument, have referred the Court to any particular provision of the Interstate Commerce act with the terms or just implication of which this mode of doing business is in conflict. The Commission, in

its report, assigns no reason why such mode of business is not lawful, except the statement that it is not customary. Indeed, counsel for the Commission took occasion to say expressly that he regarded this mode of adjusting its rates by the defendant so as to furnish a lower rate during the summer, or dull season, than was furnished during the winter, or active season, as a sound, perfectly just, and proper business method in and of itself, and apparently conceding that it might be well if the act of Congress allowed the business to be transacted in this way. It is difficult to understand how the question of whether such a difference in rates had been customary or not was controlling in the decision of that point. It has not been suggested that there is any particular common-law principle which prohibited what was thus done, and it is certain that methods of business have been followed for almost time out of mind closely analogous to this. It is customary in manufacturing and other industrial establishments to lower the price of goods in order to keep business going during the summer, or dull season of the year. And so, too, it is a matter of common knowledge that coal in any market may be bought during the summer or heated season of the year at rates lower than it can be obtained during the winter, when the consumption is large, and the demand for this commodity active. It is well known, as the proof in this case abundantly shows, that it is very difficult for mining and manufacturing establishments to find market during the summer months for the product or output of such establishments. This is due to the fact that there is comparatively little demand for their products during those months. It has

come to be well known, therefore, as the 'surplus output' of product, and the question of a market for such surplus output during the dull season of the year is everywhere recognized as a difficult one, and concessions are made in prices and rates in order that this surplus output may be handled. This is necessary to enable those owning and operating such establishments to furnish employment to the common laborers of the country, whose subsistence depends upon continuous employment. It enables those operating such concerns to keep their working forces together, in order that a sufficient output may be furnished during the active season of the year to meet the increased demands of the trade. It is apparent, therefore, that no sound public policy is affected by such mode of doing business, and counsel admits that it is in itself reasonable, just, and humane to those who need consideration most. It would be surprising, therefore, if it could be found that a mere business method, wholly without objection within itself, is repugnant to the spirit and purpose of the Interstate Commerce act. The injurious effect of a suspension of business during a dull season with idle machinery, and with those dependent on wages thrown out of employment, is certainly entitled to some consideration in following out the possible results of such a rule as the Commission here announces. And if those who own and operate mining establishments may properly attempt to keep the same going during the summer season, it would be singular if the railroad company may not also have the right of keeping such appliances and cars as it devotes to the coal traffic from becoming idle, and also avoid throwing the crews of men

who operate such cars out of employment, by joining with the coal miners in a reduction of rates in order to find a market for the surplus output. The Interstate Commerce act is not to be construed so as to abridge or take away the common-law right of the carrier to make contracts and adopt proper business methods further than its terms and recognized purposes require. * * *

"I am, therefore, without further discussion, clearly of opinion that the defendant railroad company had the right to make a difference in its summer and winter rates on the coal traffic. It is to be observed that I am not now called upon to pronounce any opinion as to whether either the summer or winter rate is in and of itself just and reasonable, being restricted, as before stated, to an approval or disapproval of the action of the Commission."

On the question of fact involved in this case, which was whether the rates in question had been shown to discriminate unjustly against Nashville, the court disagreed with the Commission.

The former said:

"Taking the case as it was, and the rates as put in effect at the time the Commission decided the case, Memphis was left with an even or flat rate of $1.40 per ton on all classes of coal the year round; and Nashville with a rate of $1.00 per ton on the cheaper class of coal, uniform for all seasons of the year, and with a rate of $1.15 on 'screened' coal during the summer, and $1.40 during the winter. This was a difference of 40 cents per ton on the lower grade of coal

(which was more largely consumed) in favor of Nashville the year round, and a difference of 25 cents per ton on 'screened or grate' coal during the summer, with the same rate as Memphis on that class of coal during the winter. The average for the year on either class was much in favor of Nashville. It would hardly be contended that this absolute advantage in rates to Nashville as against Memphis would work such discrimination as to injuriously affect Nashville in commerce, industrial pursuits, or growth, and there is no proof in the record indicating any such condition of things as this. Under such rates every consumer and every trader at Memphis would pay a higher price for coal of the same quality than would be paid by the trader or consumer at Nashville. Just how this could injuriously affect Nashville has not been suggested, and it is certain, I think, that no process of reasoning could show how an injurious result to Nashville is brought about, unless upon the basis of a relative rate which consumers and traders at each place should have, taking into account the relative distance of the two cities from the Earlington mines, and by putting the rates between the two places on a mileage basis only. * * *

"In the absence of a more definite finding and statement of conclusions by the Commission, it must be assumed, as I think the result shows, that the Commission contrasted the distance at which the two cities are situated from the mines, and also contrasted the difference in rates, and concluded that the Nashville rate was relatively too high, and that this mode of adjusting the rates gave an undue preference, and was a violation of section 3 of the act; and that the Commission rested its decision in part, though not entirely, upon this proposition."

The decision in this case sharply criticises the Commission for failure to present the case to the court in a proper and intelligible form, saying:

"The Commission is authorized to provide for the publication of its reports and decisions, and for the distribution thereof. Other sections of the act, not necessary to be set out herein, make it evident, in my opinion, that while the investigation and report of the Commission and its order thereon, as stated, do not constitute a judicial proceeding, still it was the intention of Congress that the procedure should substantially conform to that before a court, charged with the duty of finding the facts, and giving judgment thereon, or to the investigation and report of a referee or special master in chancery, passing on both facts and law. Congress having provided for such investigation and report in general terms only, it is not to be doubted that substantial conformity to a judicial proceeding was contemplated. And the importance of the Commission's action, taking substantially the form of a judicial proceeding, is apparent when it is recognized that the Commission is composed of men of ability and experience, selected for this position with reference to their particular qualifications therefor, and whose entire time is devoted to questions arising under this Act. This gives to the Commission's finding and opinion great weight, and entitles it to great consideration, both by the parties affected and by the courts, when called upon to enforce obedience to its mandates. For the Commission's investigation and opinion to have this intended value, however, it should, in fact, conform to the purpose of Congress

in requiring such proceedings. It is not sufficient, therefore, in a report of its findings of fact and conclusions, to do so in such general way as not to disclose its views upon particular phases of the evidence, or its conclusions of law upon facts found with reference to the particular issues in the case. Stated in another form, it is not sufficient for the report to be made up of mere conclusions. Its opinion or report should show what the issues in the case are, and what facts it finds in regard to such issues. The report should make suitable reference to the evidence adduced in regard to any particular question, where there is a conflict in the proof, showing how the Commission settles the disputed fact; or, if the evidence in regard to any issue is undisputed, state that fact. In other words, the report should give the parties to be affected, as well as the court, in any judicial proceeding afterwards instituted, definite and distinct information as to what was found as facts, and the Commission's opinion thereon, such as would be necessary to make a judicial opinion sufficient and satisfactory for the purpose of ordinary litigation. Now, the report of the Commission in this case does nothing of this kind. It was not intended to cast upon the courts the labor of an original and independent examination, as in a case instituted here in the first instance. If so, action by the Commission would be idle. The report should on all issues make a distinct showing, so that on its face it would be *prima facie* good as required under the Act. The main issue made in the answer to the original complaint, as well as now in the answer to the suit in this court, is and was that the difference in the rates from the Earlington mines to Nashville and those from the same

point to Memphis was rendered necessary and was justified by competitive freight rates at that point, and particularly in regard to the rates on coal, by competition in coal coming from the Pittsburg mines by means of river transportation to Memphis. The report of the Commission, notwithstanding this was the main issue, makes but a passing allusion to the fact of competition at Memphis. The report shows nothing as to the cost of coal at the Pittsburg mines, the rate per ton at which it was transported to Memphis, or the price at which such coal was sold; and the Commission does not consider nor decide to what extent, if at all, this competition affects the rates which the Louisville & Nashville Railroad Company can make on coal shipped from the Earlington mines to Memphis, so that the rate, together with the price, will enable that coal to be handled on the Memphis market. If the facts in relation to this question of competition were at all important, in this case, it is certain that the Commission did not so consider it, as that entire subject was summarily dismissed without any finding of facts or the expression of any opinion in regard thereto. Indeed, much of the argument at the bar on both sides has been directed to the question of what the Commission did or did not find or decide in this case. It is contended, for example, by the learned counsel for the Commission, that it did investigate, and did decide that the rate from Earlington to Nashville was in and of itself unreasonable and unjustly high without regard to the Memphis rate at all; while counsel for the defendant earnestly insists (and successfully, I think) that the Commission decided no such question. It is to be regretted, of course, that a report so important as this,

both in its effect on the parties and as a basis of suit in this court, should become the subject of construction in order to ascertain what was really decided."

Chattanooga Case.*

"The record makes it clear that in allowing this order the Commission thought that its literal enforcement would bring about an injustice."—Decision of the Supreme Court in this case.

This is the first, to be discussed in this memorandum, of a series of cases of which it must be said that, if it is conceded that the facts put in controversy by the complaint establish a genuine case of injustice, the erroneous conclusions of law adopted by the Commission stood in the way of adequate relief to the complainant. In this particular case the order of the Commission was based upon an interpretation of law which went so far as to preclude any real investigation of the facts by the Commission. The Circuit Court rejected utterly the interpretation of the law adopted

* The Board of Trade of Chattanooga *vs.* The East Tennessee, Virginia & Georgia Railway Company *et al.;* Interstate Commerce Commission (5 I. C. C. Rep. 546), decided December 30, 1892. Interstate Commerce Commission *vs.* East Tennessee, Virginia & Georgia Railway Company *et al.;* Circuit Court, Eastern District of Tennessee (85 Fed. Rep. 107), decided February 2, 1898. East Tennessee, Virginia & Georgia Railway Company *et al.*, Appellants, *vs.* Interstate Commerce Commission; Supreme Court (181 U. S. 1), decided April 8, 1901.

by the Commission, but conducted an inquiry of its own concerning the facts, and upon the basis thus formed issued a decree enforcing the Commission's order. In this course it had the approval of the Circuit Court of Appeals which affirmed the decree. The Supreme Court, however, found insuperable obstacles to enforcing the order of the Commission upon findings of fact made by the lower Federal courts when those findings appeared to the Court of last resort, as they did in this instance, to be "irreconcilable with what was found by the Commission."

The complaint in this case related to through rates from Boston, New York, Philadelphia, and Baltimore to Chattanooga. It was alleged that these rates were unreasonable and unjust in themselves, and that, as compared with rates from the same points to Nashville and Memphis, they subjected the residents of Chattanooga to unjust prejudice and disadvantage. Further, as the rates to Nashville and Memphis were lower than to Chattanooga and the latter is an intermediate point on some of the routes to the two former cities it was alleged that the long and short haul clause was violated. The case was decided by the Commission wholly upon the latter ground and upon the narrow and unsubstantial basis of its ruling in the Georgia Commission cases (5 I. C. C. Rep. 324), which was as follows:

"The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the

shorter distance under the Fourth section in all cases where the circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers not subject to regulation under the Act to regulate commerce. In other cases under the Fourth section, the circumstances and conditions are not presumptively dissimilar, and carriers must not charge less for the longer distance, except upon the order of this Commission."

The Commission, therefore, issued its order commanding the defendants "to cease and desist from making, enforcing or receiving any higher rates" to Chattanooga than to Nashville. It was deemed:

"unnecessary to make any comment upon the rates in force at Memphis, or give any directions in respect thereto, because * * * the fundamental question in this case arises between Chattanooga and Nashville and an equitable adjustment of rates between those towns may obviate any separate consideration of the Memphis tariff."

Concerning the Commission's order in this case the Supreme Court said:

"The record makes it clear that in allowing this order the Commission thought that its literal enforcement would bring about an injustice, and, therefore, that the order was entered solely because it was deemed that the technical requirements of the statute must be complied with."

There is ample justification for this conclusion of the

Supreme Court in the report and opinion of the Commission. Indeed it is beyond question that the Commission fully understood that the acceptance of its order as a legal order by the defendants or its sanction by the final decree of the Courts would result in an appeal to the Commission by the defendant carrier for relief from the general rule of the long and short haul clause and that when such a petition was received and considered it expected to find reasons for authorizing lower rates to Nashville than to Chattanooga, the intermediate point. Thus, after reviewing the facts and in commencing the statement of its conclusions the Commission said:

"The situation which we have thus attempted to describe is one of peculiar difficulty. It is easy to perceive the disadvantages which gave rise to this complaint, but the remedy that can be applied, with due regard to the rights of the carriers affected, is not readily discovered. The prejudice to which Chattanooga is subjected by reason of the lower rates of transportation to Nashville and Memphis is obvious and conceded, but how to avoid that result without unjust consequences to the defendants is an extremely obstinate problem."

The opinion of the Commission in this case, from which the foregoing is quoted, was prepared by Mr. Chairman Knapp, a master of English and one accustomed carefully to weigh the nicest distinctions in the meaning of words.

It should not escape attention, therefore, that he speaks of "prejudice" and not, in the terms of the law, of "undue or unreasonable prejudice" as resulting to Chattanooga from the adjustment of rates then in controversy. Stronger evidence that the Commission knew that injustice would result from the literal enforcement of its order is found in the following extract from its opinion:

" * * * this disposition of the case is not intended to preclude the defendants from applying to the Commission for relief from the restrictions imposed by the Fourth section of the Act, on the ground that the situation in which they are placed with reference to this Nashville traffic constitutes one of the 'special cases' to which the proviso clause of that section should be applied."

Again, in concluding its report and opinion, the Commission said:

"To enable the defendants to apply for relief under the proviso clause of the Fourth section of the Act to regulate commerce, this order will be suspended until the first day of February, 1893; * * * In case such relief shall be applied for within the time mentioned, the question of further suspending this order until the hearing and determination of such application will be duly considered."

The enforcement of the Commission's order would not, directly at least, have brought about any modification of

the rates in force either to Chattanooga or to Nashville. The defendant carriers could not have afforded to reduce their Chattanooga rates to the level of the Nashville rates; they could not control the latter. All that would have happened would have been the withdrawal of the routes via Chattanooga from competition for Nashville business. As it is to be supposed that the Nashville business, although not paying a share proportionate to its volume of the maintenance expenses and fixed charges of the routes through Chattanooga, contributed something to one or both of these necessary items in the total cost of transportation it is probable that the withdrawal of these routes from the competition for Nashville traffic might indirectly have caused an advance in some other charges, possibly those at Chattanooga. The Commission thoroughly understood that the Chattanooga lines were not able to control the Nashville rates, for it said in its opinion:

"* * * the present Nashville rate is prescribed by the rail lines, reaching that point via Cincinnati, and that the defendant lines through Chattanooga have no voice or influence in determining its amount. These lines are under compulsion, therefore, to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, or abandon the large percentage of Nashville business which they now secure."

Again, clearly showing its appreciation of the injustice which might result from the enforcement of the terms of its order, the Commission declared that "the allowance of the same rate" to Chattanooga as to Nashville "might reduce their revenues," meaning those of the railways then engaged in carrying traffic through Chattanooga to Nashville, "below the limits of fair compensation."

If the enforcement of an order would be unjust, as the Supreme Court said in this case it would be, it seems to follow that refusal to enforce it is in the direction of substantial justice. A quotation from the decision of the Supreme Court is pertinent. That Court said:

"* * * the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge. Indeed, the findings of fact made by the Commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville. The Commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines. From this it follows that, even although the defendant carriers had not taken the dissimilarity of circumstances and conditions into view,

and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, the preference in favor of Nashville growing out of the conditions there existing would have remained in force, and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short haul clause had not been brought into play."

Thus, although the Supreme Court, like the Commission, decided this question upon purely legal grounds it appears that the respective judgments differed in this, viz: that the Supreme Court believed that its decree would prevent injustice while the Commission knew that, unless prevented by further proceedings, the enforcement of its order would produce injustice.

Discussing the legal question, which was of controlling force, the Supreme Court thrust aside the Commission's conclusions of law, in the following language:

"Taking into view the terms of the order and the reasons given by the Commission for considering only one aspect of the controversy and excluding all others, it is obvious that that body construed the Act to regulate commerce as meaning that, however controlling competition might be on rates to any given place, if it arose from the action of one or more carriers who were subject to the law to regulate commerce, the dissimilarity of circumstance and condition provided in

the fourth section could not be produced by such competition unless the previous assent of the Commission was given to the taking by the carrier of such competition into view in fixing rates to the competitive point. This in effect was to say that the dissimilarity of circumstance and condition prescribed in the law was not the criterion by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance, unless the assent of the Commission was asked and given. This in substance but decided that the dissimilarity of circumstances and conditions prescribed in the law was not the rule by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance, but that such right solely sprang from the assent of the Commission. In other words, that the dissimilarity of circumstances and conditions became a factor only in consequence of an act of grace or of a discretion flowing from or exercised by the Commission. This logical result of the construction of the statute adopted by the Commission was well illustrated by the facts found by it and to which the theory announced was in this case applied. Thus, although the Commission found as a fact that the competition at Nashville was of such a preponderating nature that the carriers must either continue to charge a lesser rate for a longer haul to Nashville than was asked for the shorter haul to Chattanooga, or abandon all Nashville traffic, nevertheless they were forbidden to make the lesser charge for the longer haul. In other words, they were ordered to desist from all Nashville traffic unless they applied to the Commission for the privilege of continuing such traffic by obtaining its assent to meet the dominant rate prevailing at Nash-

ville. But since the ruling of the Commission was made in this case, it has been settled by this court that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point. That is to say, that the dissimilarity of circumstance and condition pointed out by the statute, which relieves from the long and short haul clause arises from the command of the statute, and not from the assent of the Commission; the law, and not the discretion of the Commission, determining the rights of the parties. It follows that the construction affixed by the Commission to the statute upon which its entire action was predicated was wrong."

Georgia Commission Cases.*

"The rates in controversy were in and of themselves just and reasonable, and did not give rise either to undue preference or to unjust discrimination."—Decision of the Supreme Court in these cases.

* L. N. Trammel, Allen Fort, and Virgil Powers, constituting and composing the Railroad Commission of Georgia, *vs.* The Clyde Steamship Company *et al.;* Interstate Commerce Commission (5 I. C. C. Rep. 324), decided November 11, 1892. Interstate Commerce Commission *vs.* Western & Atlantic Railroad Company *et al.;* Circuit Court, Northern District of Georgia (88 Fed. Rep. 186), decided June 15, 1898. Interstate Commerce Commission *vs.* Western & Atlantic Railroad Company *et al.;* Circuit Court of Appeals, Fifth Circuit (93 Fed. Rep. 83). Interstate Commerce Commission *vs.* Western & Atlantic Railroad Company *et al.;* Supreme Court (181 U. S. 29), decided April 8, 1901.

Seven complaints filed with the Interstate Commerce Commission at substantially the same time by the Railroad Commission of Georgia, included that entitled as above, and were heard and decided together. All the complaints alleged that certain rates established and maintained by the defendant carriers were "unreasonable, discriminating and in direct violation of Section Four of the Act to regulate commerce." The decision of the Commission states that:

"The main question presented by the pleadings is whether charges which are greater for shorter than for longer distances in the same direction over the defendant lines are unlawful under the statute."

This decision is notable as that in which the Commission reversed the opinion concerning the effect of competition of carriers subject to the law in relieving from the general rule of the Fourth section which it had formerly entertained. On June 15, 1887, the Interstate Commerce Commission, in an opinion prepared by Judge Cooley and unanimously approved by his colleagues (in the matter of the Petition of The Louisville & Nashville Railroad Company, 1 I. C. C. Rep. 31), said:

"But that which the Act does not declare unlawful must remain lawful if it was so before; and that which it fails to forbid the carrier is left at liberty to do without permission

of any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated * * * it will be found on investigation that cases will exist in which, unless the force of strictly railroad competition is allowed to create exceptions under the statute, an existing competition which is supposed to be of public interest must come to an end. And where that is the case the strong lines will in general be gainers at the expense and sometimes to the destruction of those which are weaker. * * * a strict enforcement of the general rule might be found quite as injurious to the public interests as to those of the railroads which would thereby be shut out from competition."

The syllabus of the decision, from the body of which the foregoing has been quoted, contains the following:

"When a railroad company claims that the circumstances and conditions of long and short hauls on its line are so dissimilar as to justify its making the greater charge on the shorter haul, the Commission will not on its petition decide upon the justice of its claim, but will leave it to take the initiative in fixing rates, and will decide upon their justice and propriety when complaint is made by persons or

localities who consider themselves injured. * * * the prohibition in the Fourth section of the Act to regulate commerce against a greater charge for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, as qualified therein is limited to cases in which the circumstances and conditions are substantially similar. * * * the existence of actual competition which is of controlling force, in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer, in the following cases:

1. When the competition is with carriers by water which are not subject to the provisions of the statute.

2. When the competition is with foreign or other railroads which are not subject to the provisions of the statute.

3. In rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition."

In the Georgia Commission cases the defense of the carriers was precisely in accordance with the terms of the foregoing extracts. The report and opinion of the Commission, on these cases, says:

"The defendants in their answers deny that transportation to the longer and shorter distance points is under substantially similar circumstances and conditions, and that

therefore the greater charges for shorter distances complained of do not contravene the provisions of the Act to regulate commerce. The principal grounds on which this denial is based are the competition of all rail and part rail and part water lines from the same point of consignment to the same point of destination; the competition of all rail and part rail and part water lines from different points of consignment to the same destination; and the influence of water routes which either reach the point of destination direct, or deliver to a connecting carrier at a point in the same territory."

Two of the seven Georgia Commission cases were dismissed, but in five of them orders favorable to the complainants were issued. To take this course the Commission plainly reversed its former position, saying:

"In stating in that opinion what kinds of competition might entitle the carrier to make lesser long-haul charges, or that create dissimilar circumstances and conditions under which it would be justified in charging more for shorter hauls, we now think, in the light of more than five years' operation of the statute, that the Commission should not have included in such statement, 'rare and peculiar cases of competition between railroads subject to the Act where a strict application of the general rule of the statute would be destructive of legitimate competition,' if this language in the opinion was fairly susceptible of the interpretation which the carriers have put upon it. As an exception it was not consistent with the otherwise harmonious theory on which the whole opinion was based.

"It constituted an exception to the clear reservation for the primary action of the Commission in cases involving competition between carriers subject to the act which is implied in the Fourth section. Because the instances of such 'rare and peculiar' cases cited in the opinion are such as indicate a hardship that the Commission would not fail to recognize, and by an order under the provisory clause relieve, if applied for, was no good ground for permitting the carriers to determine for themselves what cases of such competition are rare and peculiar or when any cases of strife for traffic between carriers subject to the law will, if the strict rule of the Fourth section is applied, be 'destructive of legitimate competition.' * * *

"We think there is nothing in the statute which warranted the exception."

The conclusion of law adopted by the Commission was that, when the dissimilarity of circumstances and conditions alleged in justification of a greater charge for the short haul is the result of the competition of other carriers subject to the law, the railways claiming such justification cannot avail themselves of it in defending rates questioned by complaints before the Commission, but must make them the basis of applications for relief under the "proviso" clause of the Fourth section. The following is from the report and opinion:

"A concise statement of this construction of the Fourth section on the point above discussed is: The carrier has a

right to judge in the first instance whether it is justified in making the *greater charge for the shorter distance* under the fourth section in all cases, where the circumstances and conditions arose *wholly upon its own line* or through competition for the same traffic with carriers not subject to regulation under the Act to regulate commerce. In other cases under the Fourth section, the circumstances and conditions are not presumptively dissimilar, and carriers must not charge less *for the longer distance*, except upon the order of this Commission.* Aside from overruling the 'rare and peculiar cases, exception, this construction is no departure from previous rulings and is not new."

This amazing conclusion, that permission must be applied for in order to obtain the right to do that which is nowhere forbidden, prevented any inquiry by the Commission concerning the substantial merits of the controversy before it. There was no finding that the conditions were "substantially similar," but only that the defendants had not taken the proper course to avail themselves of the kind of dissimilarity which they alleged. The Commission's orders encouraged them to apply for relief from the general rule of the Fourth section. One of the orders was outlined in the opinion, as follows:

"The order will therefore be that the defendants in this case cease and desist, within twenty days after receiving a

* The italics in this quotation are in the original.

copy thereof, from charging or receiving any greater compensation in the aggregate for the transportation of a like kind of property from Cincinnati or other points, called and known as Ohio river points, for the shorter distance to Calhoun, Adairsville, Kingston, Cartersville, Acworth, or Marietta, than for the longer distance over the same line in the same direction to Atlanta, the shorter being included within the longer distance; or, that the defendants make and file with the Commission, within the time above specified, an application or applications, as the case may require, as provided in the proviso of the Fourth section of the Act to regulate commerce, for relief from the operation of that section in respect to the prohibition therein contained against charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from Cincinnati and other Ohio river points to the shorter distance points above mentioned than for such transportation over the same line in the same direction for the longer distance to Atlanta, and show cause within sixty days after service of the order why such application for relief should be granted; and upon such application the evidence already taken in this case may be used. In case the application for relief shall be denied the order to cease and desist shall stand, and compliance therewith will be required within twenty days after service of the order denying the application."

Orders of similar tenor were issued in the other cases They were not obeyed. It is scarcely possible that any one ever expected them to be obeyed. If the Commission had

followed another course; if it had inquired fully and carefully into the reasonableness of the rates complained against; if after such inquiry it had found them unreasonable and issued a lawful order of relief to the complainants, that order would probably have received, as had such orders in the past; prompt, voluntary obedience. If not voluntarily obeyed the Courts would have compelled obedience. But by adopting an interpretation of the law radically different from that unanimously announced five years earlier; an interpretation which but a single judge, among the large number who have passed upon it, has ever approved, the Commission suspended for an indefinite period the usefulness of the machinery for affording relief which the law had placed in its keeping.

The Circuit Court declined to enforce these orders, because, in the language of the Supreme Court:

"The court decided that the Commission had erroneously construed the statute in holding that competition which was actual and substantial in its effect upon rates, if resulting from the action of other carriers who were subject to the Act to regulate Commerce, could not produce the dissimilarity of circumstances and conditions provided in the Fourth section of the Act, so as to enable a carrier in adjusting rates to take into view such competition without the previous assent of the Commission."

But the foregoing was not the sole reason for the dis-

missal of the Commission's petitions in these cases by the Circuit Court. The Supreme Court declares further, concerning the Circuit Court's action, that:

"It moreover found that the rates in controversy were in and of themselves just and reasonable, and did not give rise either to undue preference or unjust discrimination."

The Circuit Court of Appeals, and finally, the Supreme Court, affirmed the refusal of the Circuit Court to enforce these orders. The following is from the opinion of the Supreme Court:

"* * * the error committed by the Commission in interpreting the statute in these cases has been at least twice heretofore pointed out in the decisions of this Court, and hence further examination of the subject is unnecessary. * * * Despite, however, the error of law which the Commission committed in these cases, and in consequence of which error it made no investigation of the facts, but postponed the performance of its duty on this subject until a further application was made for relief, it is now urged that we should enter into an original investigation of the facts for the purpose of considering a number of questions as to discrimination, as to preference, as to reasonableness of rates, as to the relation which the rates at some places bore to those at others, in order to discharge the duty which the statute has expressly in the first instance declared should be performed by the Commission."

Troy Case.*

"The evidence shows that such a rate would be absolutely ruinous."—Decision of the Circuit Court in this case.

The specific charges made by the complainant before the Commission, insisted upon at the hearing before it and to which the testimony taken by it relates, all depend upon alleged violations of the Fourth, or long and short haul, section of the law. The vast scope of the case and the necessarily far-reaching consequence of the enforcement of the views of the complainant are best indicated by an enumeration of the items of complaint which may be quoted from the Commission's report and opinion. It thus appears that the grounds of complaint were:

"1. That the Alabama Midland and the defendant roads connecting and forming lines with it from Baltimore, New York and the east to Troy and Montgomery charge and collect a higher rate on shipments of class goods from those

* The Board of Trade of Troy, Alabama, *vs.* The Alabama Midland Railway Company *et al.;* Interstate Commerce Commission (4 Inter. Com. Rep. 348), decided August 15, 1893. Interstate Commerce Commission *vs.* Alabama Midland Railway Company *et al.;* Circuit Court, Middle District of Alabama (69 Fed. Rep. 227), decided July 9, 1895. Interstate Commerce Commission, Appellant, *vs.* Alabama Midland Railway Company *et al.;* Circuit Court of Appeals (74 Fed. Rep. 715), decided June 2, 1896. Interstate Commerce Commission, Appellant, *vs.* Alabama Midland Railway Company *et al.;* Supreme Court (168 U. S. 144), decided November 8, 1897.

cities to Troy than on such shipments through Troy to Montgomery, the latter being the longer distance point by fifty-two miles.

"2. That the 'Alabama Midland and the Georgia Central and their connections unjustly discriminate against Troy, and in favor of Montgomery' in charging and collecting $3.22 per ton to Troy on phosphate rock shipped from the South Carolina and Florida fields and only $3.00 per ton on such shipments to Montgomery, the longer distance point by both said roads, and that all phosphate rock carried from said fields to Montgomery over the road of the Alabama Midland has to be hauled through Troy.

"3. That the rates on cotton established by said two roads and their connections on shipments to the Atlantic seaports, Brunswick, Savannah and Charleston, unjustly discriminate against Troy and in favor of Montgomery, in that the rate per hundred pounds from Troy is 47 cents and that from Montgomery, the longer distance point, is only 40 cents, and that such shipments from Montgomery over the road of the Alabama Midland have to pass through Troy.

"4. That on shipments for export from Montgomery and other points within what is termed in the complaint 'the jurisdiction' of the Southern Railway and Steamship Association, to the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, a lower rate is charged than the regular published tariff rate to such seaports, in that Montgomery and such other points are allowed by the rules of said Association to ship through to Liverpool via any of those seaports at the lowest through rate via any one of them on the day of the shipment, which may be much less

than the sum of the regular published rail rate and the ocean rate via the port of shipment; that this reduction is taken from the published tariff rail rate to the port of shipment; and that, this privilege being denied to Troy, is an unjust discrimination against Troy in favor of Montgomery and such other favored cities and that it is, also, a discrimination against shipments which terminate at such seaport in favor of shipments for export.

"5. That Troy is unjustly discriminated against in being charged on shipments of cotton via Montgomery to New Orleans the full local rate to Montgomery by both the Alabama Midland and the Georgia Central.

"6. That the rates on 'class' goods from western and northwestern points established by the defendants forming lines from those points to Troy are relatively unjust and discriminatory as against Troy when compared with the rates over such lines to Montgomery and Columbus."

The order of the Commission, as summarized in its report and opinion, was as follows:

"* * * that the roads participating in the traffic involved cease and desist (1) from charging and collecting on class goods shipped from Louisville, St. Louis, and Cincinnati to Troy a higher rate than is now charged and collected on such shipments to Columbus and Eufaula; (2) from charging and collecting on cotton shipped from Troy via Montgomery to New Orleans a higher through rate than 50 cents per hundred pounds; (3) from charging and collecting on shipments of cotton from Troy for export via the

Atlantic seaports, Brunswick, Savannah, Charleston, West Point, and Norfolk, a higher rate to those ports than is charged and collected on such shipments from Montgomery; (4) from charging and collecting on cotton shipped from Troy to Brunswick, Savannah, and Charleston, a higher rate than is charged and collected on such shipments from Montgomery through Troy to those ports; (5) from charging and collecting on class goods, shipped from New York, Baltimore, and the northeast to Troy, a higher rate than is charged and collected on such shipments to Montgomery; and (6) from charging and collecting on phosphate rock shipped from the South Carolina and Florida fields to Troy, a higher rate than is charged and collected on such shipments through Troy to Montgomery."

The Commission did not lose sight of the fact that obedience to its order would require sweeping changes in other rates than those complained of and a general readjustment of charges in the territory contiguous to Troy. On this point the Commission said:

"It is claimed on the part of the roads that the establishment of lower rates to Troy will disarrange and call for a readjustment of the rates to the localities around Troy in order to prevent unjust discrimination in favor of Troy and against such localities. It appears from the tariffs on file with the Commission that the through rates to these points around Troy are made on the basis of the rates to Montgomery plus the local rates from Montgomery on—in other words, that Montgomery is given the undue advan-

tage of a 'trade center' as against these points. This being the case, these rates now call for re-adjustment, with a view of remedying the unjust discrimination thus appearing. The adjustment of the rates to these points so as to make them conform to the reduced rates which we have ordered for Troy, will tend to bring them in line with the law and do away with the unjust discrimination in favor of Montgomery, already existing under them. It certainly cannot be held to be a valid objection to the correction of unlawful rates to one locality, that it involves a like correction as to other localities. Unjust discrimination as between localities or individuals cannot be essential to the business prosperity of the roads; on the contrary, we believe that in the end, if not immediately, their financial welfare would be promoted by the application in the matter of rate making of the principle of absolute fairness as between all interests, large and small, enjoined by the statute. Rates should, in the first instance, be fixed upon a fairly remunerative basis, and then so applied as to result in no undue advantage or disadvantage to any interest. It will devolve upon the roads to make whatever changes in rates to surrounding towns may be incidental to, and a necessary consequence of, compliance in good faith with our order in reference to the rates to Troy."

The Circuit Court refused to grant a decree enforcing the Commission's order, and expressed the opinion that to require conformity to the demands of the complainant before the Commission would be "absolutely ruinous" to

the Alabama Midland Railway Company. The words of the opinion, on this point, follow:

"The Troy parties claim that they shall not only have the advantage of the reduced rates between the shipping points and Montgomery, but that they are entitled to such reduced rates from Montgomery to Troy. The same thing is claimed on cotton shipped from Troy to New Orleans, via Montgomery, which is a combination of a through rate to New Orleans from Montgomery, plus the local rate from Troy to Montgomery. The evidence shows that such a rate would be absolutely ruinous to the Midland; that it would not pay operating expenses; and, besides, there is no section of the law under which such contention can be maintained."

Treating of the "basing point" system of rate-making which prevails in the region in which the rates complained of were in force the same Court said:

"In the case of transportation of property from eastern or northeastern points (New York, Philadelphia, Baltimore, etc.), whether it is all rail, or by water to Savannah and then by rail to Montgomery, through Troy, on the Midland, or from northwestern points (such as Cincinnati, Louisville, St. Louis, etc.), through Montgomery to Troy, there is what may be called a 'long haul;' and for this haul there are competing lines, all rail or all water, in some cases, or part by rail and part by water, and this gives rise to through rates and through rates give rise to 'basing points' or 'trade centers,' which, in the very nature of

things, are determined by questions of competition between lines engaged in, and seeking a share in, the carrying trade of the country. Water transportation is, doubtless, a large factor in the determination of these basing points. Other considerations may enter into the matter, but the real source of it must chiefly be found in the competition between our great lines of transportation, reaching out, as they do, for a share in the commerce of the country, and, as a general rule, cheapening the necessaries of life brought to every man's door."

Immediately following the foregoing the Court discussed the justice of the rates to Montgomery and Columbus, the cities against whose more favorable position in the adjustment of charges, Troy particularly complained, saying:

"Doubtless, there may be cases where these basing points or trade centers are fixed and determined arbitrarily, and where the motive for it may be a purpose to build up one locality at the expense of another, in violation of the spirit and provisions of the Act of Congress; but is that the case we are dealing with here? It is common knowledge—it is history—that Montgomery was a distributing point before its railroad system was known, and when there were no trunk lines of railroad, such as we now have, competing for a share of her business. Troy is a city of about 4,000 or 5,000 population, with two railroads, one of which has been but recently constructed. It is not a large distributing point; and it is not on any navigable water course. The complaint would almost seem to be that the railroad com-

panies had not made her a basing point; and that Montgomery, west of her, on the Alabama river, and Columbus east of her, on the Chattahoochee river, being basing points, this operated to her prejudice as a business point, which it no doubt does; and this is, perhaps, her real cause of complaint."

The use of the word "prejudice" in the foregoing will not mislead any one who examines the opinion of the Court. The difference between "prejudice" and "*undue or unreasonable* prejudice" was carefully and accurately distinguished, as appears from the following quotation:

"The words 'any undue or unreasonable preference or advantage' plainly imply that every preference or advantage is not condemned, but such, only, as are undue or unreasonable."

Reviewing and affirming the action of the Circuit Court the Circuit Court of Appeals declared that—

"The rates in question, when separately considered, are not unreasonable or unjust. * * * The volume of population and of business at Montgomery is many times larger than it is at Troy. There are more, many more railway lines running to and through Montgomery, connecting it with all the distant markets. The Alabama river, open all the year, is capable, if need be, of bearing to Mobile, on the sea, the burden of all the goods of every class that pass to or from Montgomery. * * * There is no suggestion in

the evidence that the traffic managers * * * are incompetent, or under the bias of any personal preference for Montgomery or prejudice against Troy that has led them, or is likely to lead them, to unjustly discriminate against Troy. * * * The volume of trade to be competed for, the number of carriers actually actively competing for it, a constantly open river present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us, as they did to the Circuit Court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those existing at Troy, and to relieve the carriers from the charges preferred against them by its board of trade."

It will be observed that both the Circuit Court and the Circuit Court of Appeals specifically decided that the order of the Commission was not warranted by the facts. The Supreme Court took the same ground, and with equal definiteness, saying:

"Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the Commission itself recognized such a state of facts by making an allowance in the rates prescribed, for

dissimilarity resulting from competition, and it was contended on behalf of the Commission, both in the courts below and in this court, that the competition did not justify the discrimination against Troy to the extent shown, and that the allowance made therefor by the Commission was a due allowance.

"The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussion by the respective counsel.

"No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceeded in the application of the evidence."

Window Shades Case.*

"The parties have been subjected to the delay and expense of trying an extraneous issue."—Decision of the Circuit Court in this case.

The complaint in this case was against the classification

* Alanson S. Page *et al. vs.* The Delaware, Lackawanna & Western Railroad Company *et al .;* Interstate Commerce Commission (6 Inter. Com. Rep. 148), decided March 23, 1894. Interstate Commerce Commission *vs.* Delaware, Lackawanna & Western Railroad Company *et al.;* Circuit Court, Northern District of New York (64 Fed. Rep. 723), decided December 3, 1894.

of window shades enforced by the defendants. This was alleged to be higher than that of other property of a similar kind in the elements of value, risk, compactness and cost of service. The comparison insisted upon was with "window hollands, and shade cloth, plain, uncut and undecorated." The latter articles took third class rates, which were much lower than the first-class rates which were applicable to window shades. The testimony indicated that the complainants had for some time obtained the lower rates by incorrectly describing their shipments as window hollands. The Commission said:

"Complainants have described their shipments of window shades as window hollands for the evident purpose of thereby obtaining lower rates than could lawfully have been charged if the proper description had been given; and, except when corrections were made by the carriers' inspection bureaus, this purpose was accomplished by the acceptance of such shipments as window hollands by the receiving road and the improper billing thereof by the local agent at third-class instead of first-class rates. * * * the practice finally resulted in the remonstrance on the part of the carriers on January 24, 1893."

After this remonstrance, from the defendants, complaint was, on March 3, 1893, made to the Commission.

The Commission was not deterred from granting the order asked for by the complainants by the fact that they had been

in the habit of incorrectly describing their shipments* for the apparent purpose of obtaining lower rates than were at the time lawful. The Commission said:

"We have first to determine what effect the complainants' admitted practice of shipping shades as hollands shall have upon our action in this case. The classification as regards these two articles was and is in no wise ambiguous, and we find that complainants did persist in designating their shade shipments as hollands with a view of securing third instead of first-class rates thereon. * * * We think they were keenly alive to the impropriety of shipping shades under the name of hollands; * * *"

In spite of the foregoing the Commission ordered a reduction in the classification of window shades in less than car-

* Section 10 of the Interstate Commerce law includes the following: "Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

load quantity shipments to the level asked by the complainants. This order was not obeyed by the defendants. The Circuit Court on being asked to enforce the order refused to do so. The opinion by Judge Wallace reads, in full, as follows:

"The order of the Interstate Commerce Commission which the Court is now asked to enforce prohibits the railway carriers, the parties respondent, from charging any greater compensation for the transportation of window shades of any description—whether the cheap article, worth $3.00 per dozen, or the hand-decorated article, worth $10.00 per pair—than the third-class rate, the rate charged for the transportation of the materials used in making window shades. Such an order, in my judgment, ignores the element of the value of the service in fixing the reasonable compensation of the carrier, and denies him any remuneration for additional risk. I cannot regard it as justifiable upon principle, and must refuse to enforce it. The petition is dismissed."

Upon the rendering of the foregoing decision the Commission certified to the Court, in substance, that:

"* * * in making the order which the court is asked in this case to enforce, the Commission did not design to make one so broad as its terms import, * * *"

and, as complainant, asked for a rehearing. Upon this application, which was denied, the Court said:

"The Court cannot substitute, for an order actually made, one such as the Commission might or should have made, or such as the Commission intended to, but failed to, make. This Court has no revisory power over the orders of the Commission. Its function in a proceeding like this is merely to inquire whether the respondents, the common carriers, have refused or neglected to perform any lawful order or requirement of the Commission. It cannot undertake to decide whether the respondents have violated one which the Commission might have lawfully made. It is not a violent presumption that if the order had been, in terms, one such as the Commission intended to make, the respondents would have contested its propriety, and refused to obey it. But such an issue is not here. As framed, the respondents, in my judgment, were justified in refusing to obey it. It is much to be regretted that the real controversy between the Minnetto Shade-Cloth Company and the respondents is not presented by the application to enforce the order made by the Commission, and that the parties have been subjected to the delay and expense of trying an extraneous issue; but the misfortune is not remediable by a rehearing, and a rehearing is therefore denied."

The decision of the Circuit Court was not appealed from. Further interpretation of the law by the courts has disclosed that the order of the Commission was unlawful on grounds other than that regarded by Judge Wallace as conclusive.

Freight Bureau Cases.*

"The importance of the question cannot be overestimated."—Decision of the Supreme Court in this case.

The complaint, in this case involved the entire adjustment of railway rates on through, southward bound freight, throughout the whole region east of the Mississippi river. Perhaps this will be made clearer by quoting from the statement of the complaints with which the report and opinion of the Commission begins. The Commission said:

"The complaints in these cases, which were heard and may be disposed of together, were filed, respectively, by the Freight Bureau of the Cincinnati Chamber of Commerce and the Chicago Freight Bureau. The former will hereinafter be referred to as the Cincinnati case, and the latter as the Chicago case.

* The Freight Bureau of the Cincinnati Chamber of Commerce *vs.* The Cincinnati, New Orleans & Texas Pacific Railway Company *et al.;* The Chicago Freight Bureau *vs.* The Louisville, New Albany & Chicago Railway Company *et al.;* Interstate Commerce Commission (4 Inter. Com. Rep. 592), decided May 29, 1894. Interstate Commerce Commission *vs.* Cincinnati, New Orleans & Texas Pacific Railway Company *et al.;* Circuit Court, Southern District of Ohio, Western Division (76 Fed. Rep. 183), decided October 8, 1896. Shinkle, Wilson & Kreis Company *et al. vs.* Louisville & Nashville Railroad Company *et al.;* Circuit Court, Southern District of Ohio, Western Division (62 Fed. Rep. 690, 76 Fed. Rep. 1007), decided July 30, 1894. Interstate Commerce Commission, Appellant, *vs.* Cincinnati, New Orleans & Texas Pacific Railway Company; Supreme Court (167 U. S. 479), decided May 24, 1897.

"In both complaints, Baltimore, Philadelphia, New York, Boston and contiguous territory, are designated 'Eastern Seaboard territory;' Knoxville and Chattanooga, Tennessee, Rome and Atlanta, Georgia, Birmingham, Anniston and Selma, Alabama, Meridian, Mississippi, and contiguous territory, 'Southern territory;' and Cincinnati, Ohio, Louisville, Kentucky, Indianapolis and Evansville, Indiana, Chicago and Cairo, Illinois, St. Louis, Missouri, and contiguous territory, 'Central territory.' These designations will be so applied in this opinion.

"The general ground of complaint in the Cincinnati case is that the rates of freight established by the defendant carriers from the Eastern Seaboard and Central territories, respectively, to Southern territory, 'unjustly discriminate in favor of the merchants and manufacturers whose business is located and transacted in Eastern Seaboard territory and against the merchants and manufacturers whose business is located and transacted in Cincinnati and other points in Central territory.' It is stated that 'the burden of the complaint lies against the relation which exists between the current rates of freight on manufactured articles and merchandise' (numbered classes) 'from Eastern Seaboard territory to Southern territory, and the current rates of freight exacted upon like commodities when shipped from Central territory to the South, and against the unfair basis of general construction of the tariffs under consideration whereby the rates charged for transportation of commodities classified under 'numbered classes' bear a much higher percentage relation to the rates from New York than do the rates on commodities enumerated under the 'lettered classes'

(food products and similar heavy traffic); and it is alleged, 'that this improper relation between rates has the effect of restraining and impeding the growth of productive industries in Central territory and encouraging and promoting similar industries in Eastern Seaboard territory, and is the direct result of an agreement established by convention between the officers of defendants, whereby in order to secure stability in rates and to prevent competition between the lines leading respectively from the Eastern Seaboard and Central territories to the South, it was decided to secure to the Eastern lines and Eastern territory the traffic in merchandise and manufactured articles and to the Western territory the traffic in food products and similar heavy commodities.' In support of these charges as to the alleged 'improper relation' between the rates from Eastern territory and Central territory to Southern territory, and between those on the numbered and lettered classes, tabular statements are given of the distances, and class rates from leading points in the Eastern and Central territories to the points named above in Southern territory and of the percentage relation borne by rates and distances from Cincinnati to those from New York.

"The complaint in the Chicago case contains similar tabular statements and charges, made applicable to Chicago, and in addition calls in question the reasonableness in themselves of the through rates from Chicago to Southern territory by the averments 'that traffic between Chicago and the Southern territory is through traffic and it is unjust to Chicago that rates from that point should be exacted by defendants based upon unreasonably high rates between

Cincinnati and other Ohio river crossings and Southern territory, to which are added substantially the local rates in effect from Chicago to Cincinnati and said other Ohio river crossings,' and that 'if Cincinnati rates are to be taken as a basis, the rates from Chicago to Southern territory should be some fair percentage above the rates from Cincinnati, or some other arbitraries above the Cincinnati rates as the present New York and Boston rates are above the rates from Baltimore.' It is also alleged that 'the same rates are charged from New York and from Boston to points in Southern territory whose distances vary more than 500 miles,' and it is claimed, that if equal rates prevail from points widely separated in Eastern territory such as New York and Boston to Southern territory, the same basis should govern in rate making to the same Southern points from stations in Central territory, such as Cincinnati and Chicago, which are much nearer together than New York and Boston.' The prayer of the complainants in both cases is for an order commanding the defendants to desist from the alleged violations of the Act to regulate commerce and requiring them to so adjust their several freight tariffs as to afford the merchants and manufacturers of Cincinnati and Chicago and other points in contiguous territory 'a fair and equal opportunity to deliver their products to consumers in the South upon such terms of equality compared with their competitors in Eastern Seaboard territory, as their geographical position, commercial ability and ample transportation facilities will justify.'"

The order of the Commission required reductions in the

rates charged from Chicago and Cincinnati to Knoxville, Chattanooga, Rome, Atlanta, Meridian, Birmingham, Anniston, and Selma and the further readjustment of rates indicated as follows:

"And said defendants * * * are also hereby notified and required to further readjust their tariffs of rates and charges, so that * * * rates * * * from Cincinnati and Chicago to southern points other than those hereinabove specified shall be in due and proper relation to rates put into effect by said defendants in compliance with the provisions of this order."

The foregoing contrasts strangely with the unanimous decision of the original Commission, written by Judge Schoonmaker (see Thatcher *v.* Delaware & Hudson Canal Company, 1 I. C. C. Rep. 152), in which the following appears:

"* * * what the complainant asks from the Commission is an order that shall require the several defendant roads to receive freights at his elevator at Schenectady for transportation to Boston and Boston points at rates less than are now charged by the same roads for the transportation of like freights to Boston and Boston points, from stations on the same lines nearer to the points of destination, * * * This is the only question which is so presented by the complaint that the Commission can pass upon it. It may be truthfully said that the several defendants might avoid any conflict with the Fourth section of the act

by reducing their charges to Boston and Boston points from the stations east of Schenectady; but this complaint does not ask the Commission to compel such reduction, nor has any evidence been given or offered which would enable us to determine what would be proper and just rates from any such stations. It is therefore impossible to fix them in this case, even if the Commission had power to make rates generally, which it has not. Its power in respect to rates is to determine whether those which the roads impose are for any reason in conflict with the statute."

The following table shows the rates in cents per 100 pounds in force from Cincinnati at the time the report and opinion was prepared and the rates ordered by the Commission:

To—	Classes.											
	1.		2.		3.		4.		5.		6.	
	Old rate.	Rate ordered.	Old rate.	Rate ordered.	Old rate.	Rate ordered.	Old rate.	Rate ordered.	Old rate.	Rate ordered.	Old rate.	Rate ordered.
Knoxville, Tenn	76	53	65	45	57	37	47	27	40	22	30	20
Chattanooga, Tenn	76	60	65	54	57	40	47	30	40	24	30	22
Rome, Ga	107	75	92	64	81	54	68	44	56	34	46	24
Atlanta, Ga	107	86	92	73	81	60	68	45	56	35	46	27
Meridian, Miss	122	114	102	98	89	80	75	62	62	49	54	38
Birmingham, Ala	89	87	79	74	68	60	55	46	47	36	36	28
Anniston, Ala	107	86	92	73	81	60	68	45	56	35	46	27
Selma, Ala	108	108	102	92	88	78	71	60	59	48	47	36

Similar reductions from Chicago were ordered and had the changes been made corresponding modifications in the rates from all points north of the Ohio river as well as to all southern points would have been necessary. The drastic character of the changes is apparent from the table. The Commission appeared to appreciate this, for it declared that "even pecuniary embarrassment of a road" would not justify the maintenance of the former rates, although it attempted to qualify this by asserting that "it is believed" that "the reduction ordered in these cases" would increase the tonnage affected so greatly as to augment the revenue there from. Such, said the Commission, is "the natural tendency, but it said nothing of the increased cost of handling the extra traffic which it anticipated. It is important to note also that the Commission paid little or no attention to the existing relations among the rates which it attempted to change. Thus, although the rates from Cincinnati to Knoxvi le and Chattanooga were the same the Commission sought to give Knoxville much lower rates than Chattanooga, taking, for example, twenty cents from the second-class rate of sixty-five cents to Knoxville and but eleven cents from the same rate to Chattanooga. The first-class rate of $1.07 to Anniston was ordered reduced by twenty-one cents, but the first-class rate of $1.08 to Selma was left untouched. The decision in this case, following that in the Social Circle case (see page 42), the courts did not discuss, at any length,

any other than the legal aspects of the case. After a Circuit Court decision adverse to the Commission the case was certified to the Supreme Court on the following question:

"Had the Interstate Commerce Commission jurisdictional power to make the order hereinbefore set forth, all proceedings preceding said order being due and regular, so far as procedure is concerned."

Although regarding the question as the same as that decided in the Social Circle case, the Supreme Court thought that it was its duty to re-examine it in its entirety, and to "determine what powers Congress has given to the Commission in respect to the matter of rates." Concerning the importance of the controversy the Court said:

"The importance of the question cannot be overestimated. Billions of dollars are invested in railroad properties. Millions of passengers, as well as millions of tons of freight, are moved each year by the railroad companies, and this transportation is carried on by a multitude of corporations working in different parts of the country and subjected to varying and diverse conditions. * * *

"The power to prescribe a tariff of rates for carriage by a common carrier * * * having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance."

The Supreme Court also declared that the power claimed by the Commission is general rate-making power and of a legislative character. Quotations on these points follow:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act. * * * It will be seen that in this case the Interstate Commerce Commission assumed the right to prescribe rates which should control in the future. * * * Some reliance was placed in the argument on this sentence, found in the opinion of this Court in Cincinnati, N. O. & T. P. R. Co. *vs.* Interstate Commerce Commission, 162 U. S. 184, (5 Inters. Com. Rep. 391):

"'If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission as reasonable.' And it is thought that this Court meant thereby that while the Commission was not in the first instance authorized to fix a rate, yet that it could, whenever complaint of an existing rate was made, give notice and direct a hearing, and upon such hearing determine whether the rate established was reasonable or unreasonable, and also what would be a reasonable rate if the one prescribed was found not to be, and that such order could be made the basis of a judgment in mandamus requiring the carrier thereafter to conform to such new rate. And the argument is now made, and made with force, that while the Commission may not have the legislative power of estab-

lishing rates, it has the judicial power of determining that a rate already established is unreasonable, and with it the power of determining what should be a reasonable rate, and enforce its judgment in this respect by proceedings in mandamus.

"The vice of this argument is that it is building up indirectly and by implication a power which is not in terms granted. It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination; to evolve, as it were, out of its own consciousness, the satisfactory solution of the difficult problem of just and reasonable rates for all the various roads in the country. And if it had intended to grant the power to establish rates, it would have said so in unmistakable terms. In this connection it must be borne in mind that the Commission is not limited in its inquiry and action to cases in which a formal complaint has been made, but under §13, 'may institute an inquiry on its own motion in the same manner and to the same effect as though complaint had been made.' By §14 whenever an investigation is made by the Commission, it becomes its duty to make a report in writing, which shall include a finding of the facts upon which its conclusions are based, together with a recommendation as to what reparation, if any, ought to be made to any party or parties who may be found to have been injured. And by §§15 and 16, if it appears to the satisfaction of the Commission that anything has been done or omitted to be done, in violation of the provisions of the Act, or of any law cognizable by the Commission, it is made its duty to cause a copy of its report to be delivered to the

carrier, with notice to desist, and failing that to apply to the courts for an order compelling obedience. There is nothing in the act requiring the Commission to proceed singly against each railroad company for each supposed or alleged violation of the Act. In this very case the order of the Commission was directed against a score or more of companies and determined the maximum rates on half a dozen classes of freight from Cincinnati and Chicago, respectively, to several named southern points and the territory contiguous thereto, so that if the power exists, as is claimed, there would be no escape from the conclusion that it would be within the discretion of the Commission of its own motion to suggest that the interstate rates on all the roads of the country were unjust and unreasonable, notify the several roads of such opinion, direct a hearing and upon such hearing make one general order, reaching to every road and covering every rate. It will never do to make a provision prescribing the mode and manner applicable to all investigations and all actions equivalent to a grant of power in reference to some specific matter not otherwise conferred."

The Court further said:

"The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact

statement, that no just rule of construction would tolerate a grant of such power by mere implication." * * *

"The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct."

Summerville Hay Case.*

"The Interstate Commerce law was intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade."—Decision of the Circuit Court in this case.

The rate on hay from Memphis, Tennessee, to Charleston, South Carolina, was nineteen cents per hundredweight. The complainant did business at Summerville, South Carolina, an intermediate point on defendants' line from Memphis to Charleston and on shipments of hay

* H. W. Behlmer *vs.* The Memphis & Charleston Railroad Company *et al.;* Interstate Commerce Commission (4 Inter. Com. Rep. 521), decided June 27, 1894. Behlmer *vs.* Louisville & Nashville Railroad Company *et al.;* Circuit Court, District of South Carolina (71 Fed. Rep. 835), decided January 22, 1896. Behlmer *vs.* Louisville & Nashville Railroad Company *et al.;* Circuit Court of Appeals, Fourth Circuit (83 Fed. Rep. 898), decided November 3, 1897. Louisville & Nashville Railroad Company *et al.*, Appellants, *vs.* Henry W. Behlmer; Supreme Court (175 U. S. 648), decided January 8, 1900.

from Memphis to Summerville over their line was charged twenty-eight cents per hundredweight, a rate equal to the Memphis to Charleston rate plus the local rate back from Charleston to Summerville. On this state of facts complaint was made to the Commission and an order obtained requiring the defendants to charge as low rates from Memphis to Summerville as to Charleston. The Commission, in its decision gave ample evidence of the fact that this order was no more than a move in a game of checkers which it proposed to play with the defendants, and that it had as little expectation of obedience as it had confidence in the substantial justice of the rule which the order nominally prescribed. The Commission wished to be appealed to for a relieving order under the "proviso" clause of the Fourth section of the law and, in order to compel the defendants to submit such an appeal, refused to consider the circumstances and conditions which might justify lower rates to Charleston than to Memphis. The Commission said:

"There is no showing in this proceeding of competition by lines not subject to the Act to regulate commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the Act, or that hay may be carried to Charleston by various rail and water or part rail and part water routes from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the

Fourth section upon their own motion. Such considerations may constitute reasons for applying to the Commission for relief under the proviso clause of that section, but for reasons stated in our decisions of the cases above cited they do not justify carriers in departing from the rule of the Fourth section without such a relieving order. * * * The just interests of the carriers are fully protected by the proviso clause of the Fourth section. * * * The very reason why the proviso was added to the section was to enable carriers to obtain relief from hardship in special cases if, upon application for relief, they make it appear that hardship actually exists. Neither of the defendants having applied for relief under the proviso to the fourth section, order will be entered, * * * but without prejudice to the right of said defendants to apply for relief under the Fourth section of the Act to regulate commerce. The filing of an application for relief by the defendants or either of them, before the time above specified, will, if it refers to transportation over this line to Charleston, operate as a stay upon this order during the pendency of proceedings on such application."

The defendant carriers declined the game which the Commission offered to play with them; they preferred to stand upon their rights under the law, which, in their opinion, justified the lower rate to Charleston. In this position they soon obtained formal judicial approval.

The Circuit Court said:

"The defendants did not avail themselves of this proviso, notwithstanding that the Commission opened the door for them to do so. So the question in this case is: Was this charge of twenty-eight cents per hundredweight from Memphis to Summerville made by these defendants, and was it made under substantially similar circumstances and conditions as the charge of nineteen cents per hundredweight from Memphis to Charleston, the distance from Memphis to Summerville being shorter than the distance from Memphis to Charleston, both Summerville and Charleston being on the same line, and in the same direction? * * *

"The circumstances of the case at bar are closely like those of the case just quoted. Charleston is a competitive point between all railroad routes, routes partly by rail and partly by water, and routes all water. If the defendants had not consented with each other to lower the rate, no hay whatever would come from the hay-producing territory tributary to Memphis, and all the southeast Atlantic States would be compelled to rely on other portions of the West, North, or Northeast for hay. The evidence clearly shows that the rate to Charleston was forced down by this competition. But this is an advantage to all the territory tributary to Charleston, and all stations share in it. No such competition exists at Summerville, a small inland town. If it, and others like it, were permitted to share in the circumstances and conditions surrounding Charleston, and to get the benefit of the competition which Charleston enjoys and they have not, then, *ex necessitate* the South Carolina Railway will be called upon to elect between its

through business and its local business, and in this election to give up the former. Thus, all stations on the line of road will pay local freight on hay, and the market, to the extent of imports from Memphis, will be destroyed. The Interstate Commerce law was intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade."

The Circuit Court of Appeals in an opinion by Judge Goff, reversed the decision of the Circuit Court and issued a decree substantially similar to the order of the Commission. From this conclusion, Judge Morris dissented, saying, among other things:

" * * * the Commission did not pass upon the question of the dissimilarity of the circumstances and conditions nor upon the question whether the rate for the shorter haul was of itself reasonable and just. They took the law to be that, by charging a greater rate for the shorter haul over the same line, the carriers were *prima facie* without justification, and that they could only be permitted lawfully to make the charge after they had been authorized upon application to the Commission under the proviso of the Fourth section. * * *

"It was error, I think, for the Commission to hold that the carriers could not justify themselves because they had not first made application for relief under the proviso of the Fourth section. It has been held that, if the carrier can show that the circumstances and conditions of the two hauls are dissimilar, the statute has not been violated. * * *

"And this seems a reasonable construction of the law. The case, therefore, it appears to me, came into the Circuit Court without any finding of fact upon which an order against the carriers could be predicated. The Circuit judge examined the testimony, and considered the evidence tending to prove that the through rate had been forced down by the natural advantages of Charleston as a trade center, having numerous routes by rail, by rail and water, and by water over which merchandise of the kind in question was brought to that city, and to compete with which the defendant carriers were obliged to reduce their railroad rates on through freight to Charleston. Summerville had no similar natural or artificial advantages, and its only carrier, the South Carolina and Georgia Railroad, was not subject to having its local rates forced down by competition below what was reasonable and just. Upon consideration of all the proven facts, the circuit judge found that the circumstances and conditions were not substantially similar and that the defendant carriers had not violated the Act. With this conclusion I agree. There is abundant proof to support it, and also to show the destructive loss which would result to the South Carolina and Georgia Railroad (the successor of the South Carolina Railroad) if it was required to conform its local rates to its share of the through rates."

The decision of the Supreme Court was against the Commission. Judge Brewer, delivering the opinion of the Court, referred to the conclusions of the Commission as follows:

"The ruling was, then, this, that some kinds of com-

petition, however material and substantial in their operation, were yet inadequate for the purpose of creating dissimilarity in circumstance and condition, to justify the independent action of the carrier, although the identical conditions of competition might be sufficient to produce such dissimilarity as to justify the Commission, on application made to it for such purpose, to authorize the carrier to charge less for a longer than was exacted for a shorter distance. * * * the construction given in this cause by the Interstate Commerce Commission and the Circuit Court of Appeals to the Fourth section of the Act to regulate commerce was erroneous."

The Supreme Court also made it clear that if there was anything unreasonable under the law in the rates complained of or in their adjustment, the Commission, through its erroneous interpretation of the law and its refusal to consider material facts when the case was before it, had stood in the way of a prompt rectification of the situation. The court said:

"If, then, we were to undertake the duty of weighing the evidence in this record, we would be called upon as a matter of original action, to investigate all these serious considerations which were shut out from view by the Commission and were not weighed by the Circuit Court of Appeals, because both the Commission and the Court erroneously construed the statute. But the law attributes *prima facie* effect to the findings of fact made by the Commission, and

that body, from the nature of its organization and the duties imposed upon it by the statute is peculiarly competent to pass upon questions of fact of the character here arising."

Truck Farmers' Case.*

"The Court can only enforce the lawful orders of the Commission."—Decision of the Circuit Court in this case.

The complaint in this case involved the rates on strawberries and vegetables from Charleston to Baltimore, Philadelphia, New York, and other northeastern markets. The substantial portion of the order of the Commission follows:

"Ordered and adjudged that the defendants (naming them), and each of them, do, within ten days after service of this order, wholly cease and desist and thenceforth abstain from charging or receiving any greater compensation in the aggregate for the transportation from Charleston, in the State of South Carolina, to Jersey City, in the State of New Jersey, of the following named and described commodities, whether shipped to New York, N. Y., and delivered to consignees at Jersey City, or shipped to Jersey

* The Truck Farmers' Association of Charleston and Vicinity *vs.* The Northeastern Railroad Company of South Carolina *et al.;* Interstate Commerce Commission (6 Inter. Com. Rep. 295), decided April 6, 1895. Interstate Commerce Commission *vs.* Northeastern Railroad Company *et al.;* Circuit Court, District of South Carolina (74 Fed. Rep. 70), decided April 30, 1896. Interstate Commerce Commission *vs.* Northeastern Railroad Company *et al.;* Circuit Court of Appeals, Fourth Circuit (83 Fed. Rep. 611), decided November 3, 1897.

City, than is hereinafter set forth as follows, to wit: (1) Six cents per quart, $1.92 per crate of 32 quarts, or $3.84 per 100 pounds, as the total charge for the transportation of, including cost of refrigeration en route, and all services incident to such transportation of, strawberries from Charleston aforesaid to Jersey City aforesaid. (2) Fifty-nine and one-half cents per standard barrel or barrel crate for the transportation of apples, onions, turnips, squash, or cymling, or egg plant, from Charleston aforesaid to Jersey City aforesaid. (3) A rate or sum for the transportation of cabbages shipped in standard barrels or barrel crates from Charleston aforesaid to Jersey City aforesaid, or New York, N. Y., which is three-fourths of the rate or sum contemporaneously charged by defendants on potatoes shipped in standard barrels or barrel crates between said points. It is further ordered that said defendants be, and they severally are hereby, required to readjust their rates for the transportation of the commodities hereinabove specified from Charleston aforesaid to Philadelphia, Pa., Baltimore, Md., and Washington, D. C., so as to bring them in conformity with the law when compared with rates to Jersey City or New York, which will be put into effect by said defendants under the terms of this order."

No opinion as to the reasonableness of the rates involved was expressed either by the Circuit Court or by the Circuit Court of Appeals. The gist of both opinions is contained in the following sentence from the opinion of the Circuit Court, delivered by Judge Simonton:

"The Interstate Commerce Commission asks this Court to enforce its orders fixing rates for truck between Charleston and New York. The Court can only enforce the lawful orders of the Commission. As has been seen, the Commission is not warranted by the Act of Congress to fix rates, and to this extent its order is not lawful."

There was no appeal to the Supreme Court in this case.

Iron Rates Case.*

"The Interstate Commerce Commission has not been vested with the legislative power to prescribe rates."—Decision of the Circuit Court of Appeals in this case.

The facts in this case and its history before the Circuit Court are stated by the Commission in its Fourteenth (1900) Annual Report, as follows:

"In November, 1895, the Commission decided, in a case

* Colorado Fuel & Iron Company *vs.* The Southern Pacific Company *et al.;* Interstate Commerce Commission (6 Inter. Com. Rep. 488), decided November 25, 1895. Interstate Commerce Commission *vs.* Southern Pacific Company *et al.;* Circuit Court, District of Colorado (74 Fed. Rep. 42), plea to jurisdiction overruled May 12, 1896. Southern Pacific Company, Appellants, *vs.* Colorado Fuel and Iron Company; Colorado Fuel & Iron Company, Appellants, *vs.* Southern Pacific Company *et al.;* Circuit Court of Appeals, Eighth Circuit (101 Fed. Rep. 779), decided April 16, 1900. Colorado Fuel & Iron Company, Appellant, *vs.* Southern Pacific Company *et al.;* Supreme Court (46 L. Ed. 1264), dismissed for stipulation, November 8, 1901.

brought by the Colorado Fuel and Iron Company, that the rate charged by carriers from Pueblo, Colorado, to San Francisco, California, on iron and steel articles, amounting to $1.60 per 100 pounds, was unlawful under the Act to regulate commerce, and that the rates charged on such articles from Pueblo to San Francisco should not be more than 75 per cent of the rates contemporaneously charged on like traffic from Chicago to San Francisco, nor more than 45 cents per 100 pounds on steel rails and fastenings, and 37½ cents per 100 pounds on bar iron and other enumerated iron articles. The maximum rates so fixed were 75 per cent of the rates then in force from Chicago to San Francisco.

"The rates ordered by the Commission were not put in force as required by the order, and a proceeding was instituted in the Circuit Court for the District of Colorado to enforce the order. While that suit was pending, and after the court had overruled a demurrer filed by the Southern Pacific, the rates required under the order of the Commission were put into effect by the carriers. These rates were maintained for about two years and until about October 17, 1898, when the Southern Pacific Company gave notice of a proposed increase in rates to 60 cents per 100 pounds on steel rails and fastenings, and 75 cents per 100 pounds on other steel and iron products. Thereupon the Colorado Fuel and Iron Company filed a bill in the Circuit Court for the District of Colorado against the Southern Pacific Company and its connecting railroads for the purpose of preventing them from putting in force such increased rates, and prayed for an injunction. No answers having been filed, a decree *pro*

confesso was subsequently entered. The complainant also having asked for damages in the sum of $100,000, subsequent proceedings were taken before a master to ascertain the amount of the complainant's damages, and after the master had filed his report recommending a decree for damages in the sum of $35,300 the case came before the court for final hearing and decree.

"The court rejected the complainant's demand for damages, but awarded an injunction, first, that the defendants be enjoined and restrained from further continuing to violate and disobey the order of the Commission, and, second, that the defendants be enjoined and required, in respect of complainant's traffic from Pueblo to San Francisco and other points in California, to cease and desist from unjust and unreasonable charges, or from demanding a greater compensation for services to be rendered the complainant than they charge other persons for a like and contemporaneous service in the transporation of like kind of traffic under substantially similar circumstances and conditions, or from giving undue and unreasonable preference and advantage to particular persons, corporations, and localities at Chicago, Ill., and elsewhere eastward of that city, or from subjecting the complainant and its traffic to undue and unreasonable prejudice and disadvantage and unjust discrimination, or from preventing the complainant from having its interstate traffic moved upon terms and conditions as favorable as those given by them for like traffic under similar circumstances and conditions for other shipments.

"A third paragraph in the restraining order required the

defendant carriers to move the interstate traffic of the complainant at the samerates charged and upon terms as favorable as those given by the defendants, under similar conditions, to any other shipper, to the end that they charge and demand from the complainant for transportation from Pueblo to San Francisco and other California points on steel rails and fastenings no more than 45 cents per 100 pounds, and on bar iron and other iron articles named no more than 37½ cents per 100 pounds."

The Colorado Fuel & Iron Company appealed from that portion of the decree which disallowed the damages that it claimed, and the Southern Pacific from that portion relating to its rates. Both points were decided against the complainant before the Commission, and the ensuing appeal to the Supreme Court was dismissed by agreement between the parties. The decision of the Circuit Court of Appeals contains the following suggestions concerning the power which the Commission assumed to exercise:

"* * * the Interstate Commerce Commission has not been vested with the legislative power to prescribe rates, either directly or indirectly. Prescribing a rate from Pueblo, Colo., to San Francisco, Cal., by reference to a rate that had theretofore been established by carriers between Chicago and San Francisco, involved the exercise of legislative functions to the same extent as fixing the rate between the former points on an independent consideration of what would be a reasonable compensation for the service. In either event, far reaching questions of public policy arise,

and many circumstances and conditions affect the question to be solved, so that it cannot be said that the problem of fixing a reasonable rate from Colorado points to the Pacific Slope became a simple one involving no exercise of legislative discretion, when it appeared that the carriers had established a rate from Chicago to Pacific coast points."

Again, in this case, it is apparent from the decision of the Court that, if it be admitted that there were equities between the parties which required correction by a lawful order of the Commission, the latter, by assuming to exercise powers not conferred upon it by Congress, indefinitely postponed the correction of evils which it was created to eradicate. Thus the court said:

"It must also be borne in mind that in the case in hand we are not called upon to deal with a joint through line, and with a rate to an intermediate point on that line, which, by the express command of Congress, cannot be made greater than the through rate, if the conditions of carriage are substantially the same. No joint through line under a common control and management is disclosed by the present record. Besides, the Commission by its order of November 25, 1895, did not enjoin that the rate for the short haul from Pueblo to San Francisco should not exceed the rate for the long haul from Chicago, but it went beyond that limit, and undertook to declare that the rate for the shorter distance should not exceed three-fourths of the rate for the longer distance, thereby assuming to establish a rate by relation.

We feel constrained to hold that the Commission exceeded its authority in this part of the order, and that it had no more power to fix a rate from Pueblo to San Francisco by relation to the theretofore existing rate from Chicago to San Francisco than it had to fix the former rate upon an independent consideration of what would be a reasonable charge."

The Court also used the following suggestive language concerning the opportunities for legal redress open to shippers who are unreasonably treated by railway carriers:

"When the carrier promulgates a schedule of rates without previous conference with its patrons, it acts under the mandate of the statute and the Common Law that all rates must be fair and reasonable, and under and subject to the rule that it may be called to account by the shipper in an action at law for damages, provided any unreasonable or unjust rate or charge is either exacted from the shipper or demanded. When a rate that has been exacted or demanded is challenged on the ground that it was unreasonable or unjust, it is within the province of a court and jury to determine the issue so raised, and to redress the wrong, if one has been committed; but, before an alleged unreasonable rate has been either paid or demanded on an actual tender of merchandise for shipment, it is not within the legitimate province of a court of equity to interpose and fix a maximum rate, and thereupon enjoin the carrier from demanding more than the rate so established. Such an order effectually deprives an interstate carrier of its right

to change and fix rates which is conceded to it by the Interstate Commerce act. It is tantamount both to making a contract between the shipper and the carrier, and to an exercise of the legislative power of prescribing rates, neither of which powers properly belongs to a court of equity. * * *

"Aside from the foregoing considerations, we perceive no reason why the remedy at law for the threatened wrong should be pronounced ineffectual or inadequate. The damages that the complainant will sustain if it is right in its contention as to the unreasonableness of the proposed rates can be ascertained by a court and jury, while it is not suggested that the defendant company is insolvent, or that it will be unable to respond for such damages as a jury may assess. Besides, a single verdict before a jury establishing the unreasonableness or discriminating character of the proposed rate would probably lead to a withdrawal of the rate, and avoid the necessity of further actions."

Piedmont Cases.*

"The Commission did not consider whether the rates to Piedmont and Anniston, respectively, were just and reasonable."—Decision of the Circuit Court in this case.

The complainants before the Commission, in these cases,

* E. D. McClelen *et al. vs.* The Southern Railway *et al.*, two cases; Interstate Commerce Commission (6 Inter. Com. Rep. 588), decided June 6, 1896. Interstate Commerce Commission *vs.* Southern Railway Company *et al.*, two cases; Circuit Court, Northern District of Alabama, Southern Division; (105 Fed. Rep. 703), decided November 3, 1900.

which were heard and decided together, included the Mayor and certain business men of the town of Piedmont, Alabama. They objected to the adjustment of rates from New York, Philadelphia, Baltimore and Chattanooga as between Piedmont and Anniston, Alabama, contending that in comparison with the rates to the latter point, those to the former were "unreasonable and unjust" thus giving "an undue and unreasonable preference or advantage to Anniston and subjecting Piedmont and those doing business in the surrounding country to an undue prejudice or disadvantage." It was also urged that Piedmont being an intermediate point on defendants' line to Anniston the long and short haul clause of the law was violated by the higher charges to the former than to the latter. It was not contended that the rates to either Piedmont or Anniston were unjust or unreasonable in themselves. In deciding the cases the Commission said:

"There is no charge in either complaint that the rates in question to Piedmont are excessive, or are unreasonable in themselves, but the complaint in substance is that they are unreasonable and unjust *as compared with the rates* to Anniston,* in that they give the latter city an undue preference or advantage, and subject the former to an undue prejudice or disadvantage in territory in which they meet in active competition. The exaction, without lawful excuse, of a greater

* The italics are in the original.

compensation in the aggregate for the shorter than for the longer haul over the same line in the same direction, the shorter being included in the longer, which is forbidden by Section four of the Act to regulate commerce, is only a form of unjust discrimination or undue preference, to which, it seems, Congress desired to call particular attention because of its prevalence in certain sections of the country."

The case was tried as one arising under the long and short haul clause of the law and the possibility that other sections of the statute might be found on investigation to be applicable was not, apparently, regarded as of sufficient weight to warrant its consideration. The Commission, being still under the impression that an appeal to its indulgence was necessary to warrant railways in recognizing in their rate sheets certain elements of dissimilarity of circumstances and conditions, and no request for the exercise of the dispensing power which it imagined itself to possess having been made, decided the matter in almost summary fashion. Its "conclusions" occupy less than two printed pages and the following is an extract:

"The defendants claim that the greater charges for the shorter distances to Piedmont, as shown in these cases, are justified by the competition of another railroad carrier subject to the Act to regulate commerce. Under the construction by the Commission of the Fourth section, or 'long and short haul clause,' of the statute, in its former rulings, this claim cannot be admitted except upon

application to the Commission for exemption from the rule, because the competition under which the defendants would justify the lower rates to Anniston, the longer haul, than to Piedmont, the shorter haul, arises with a competitor, the Louisville and Nashville Railroad Company, which is an interstate carrier by rail and amenable to the Act to regulate commerce. The elements of competition and all matters relative thereto may be presented to the Commission for determination upon application of defendants for relief from the operation of the Fourth section of the Act, under the proviso to said Act. The decision herein is in no wise to be construed to preclude the defendants from making such application under the provisions of the Act."

The Circuit Court, in declaring that the Commission had not made a lawful order, and therefore had not made one which the courts could enforce, called attention to the Commission's failure to take a broad view of the facts involved, saying:

"The Commission did not consider whether the rates to Piedmont and Anniston, respectively, were just and reasonable, * * * The Commission did not consider whether the disparity in rates between Piedmont and Anniston constituted an unjust discrimination against Piedmont under the second section, or an undue preference of Anniston under the Third section, of the Act, * * * When it approached the Fourth section of the Act, the Commission declined to weigh the evidence before it as to the existence of competition at Anniston, except so far as to enable it to

determine that the evidence established that the competition at Anniston relied upon by the carriers was alone engendered by the presence there of other carriers, who were subject to the Commerce law."

No appeal was taken by the Commission in this case.

La Grange Case.*

"We fail to see how there was any just cause of complaint."—Decision of the Supreme Court in this case.

This case is especially notable as being the first arising under the long and short haul clause in which the Commission recognized the construction of the statute, which had been sanctioned in successive decisions by the Federal courts, that competition by carriers subject to the Act may produce the dissimilar circumstances and conditions which make the Fourth section inapplicable. The complaint alleged that the rates charged by the defendants on shipments from New Orleans to La Grange, Georgia, were

* Fuller E. Calloway *vs.* Louisville & Nashville Railroad Company *et al.;* Interstate Commerce Commission (7 Inter. Com. Rep. 431), decided December 31, 1897. Interstate Commerce Commission *vs.* Louisville & Nashville Railroad Company *et al.;* Circuit Court, Southern District of Alabama (102 Fed. Rep. 709), decided December 2, 1899. Louisville & Nashville Railroad Company *et al.*, Appellants, *vs.* Interstate Com. merce Commission; Circuit Court of Appeals, Fifth Circuit (108 Fed-Rep. 988), decided May 14, 1901. Interstate Commerce Commission, Appellant, *vs.* Louisville & Nashville Railroad Company *et al.;* Supreme Court (190 U. S. 273), decided May 18, 1903.

unjust and unreasonable in themselves, and relatively unjust and unreasonable as compared to lower rates charged by the defendants for carrying the same commodities from New Orleans, through La Grange, to Hogansville, Newnan, Palmetto and Fairburn, Georgia, and other localities. The rates to the points named were made by adding to the through rates to Atlanta, a point further from New Orleans than any of those named, the local rates back from Atlanta to the respective destinations. Thus the local stations were given the benefit of any reduction in the Atlanta rate due to competition at that point. The Commission, however, decided that the rates to La Grange were unreasonable in the extent in which they exceeded those to Hogansville, Newnan, Palmetto or Fairburn. The record on which this order of the Commission was based contained no testimony in support of the complaint except that of the complainant, but it did include a great deal of evidence, both oral and documentary, which was introduced by the defendant carriers in support of their position. This position is fairly set forth by the following extract from one of the answers to the complaint.

"The rates from Atlanta to those stations, respectively, LaGrange, Hogansville, Newnan, Palmetto and Fairburn, are fixed by the Georgia Railroad Commission, and are just and reasonable. The rates from New Orleans to Atlanta, are fixed by the competition between markets, and the com-

petition between carriers, as explained above, and are just and reasonable. The rates charged by respondents are the sum of those rates, and therefore respondents' rates themselves are just and reasonable. The reason that Fairburn, Palmetto, Newnan and Hogansville have lower rates than LaGrange is due alone to the fact that they are nearer to Atlanta, and not to any favoritism or discrimination on the part of respondents."

The order not being obeyed, the Commission appealed to the Circuit Court, which issued an injunction restraining the defendants from continuing their disobedience thereto. This court, while concurring in some of the conclusions of the Commission, expressed itself in part as follows:

"The Court is not so clear as to the proposition that the rates from New Orleans to LaGrange are unreasonable and unjust in themselves, and relatively so as compared with the rates to Atlanta. The question as to what is a reasonable and just rate is a very difficult one. 'No more difficult problem can be presented than this.' * * * But the findings of fact in the report of the Commission are made by law *prima facie* evidence of the matters therein stated, and the conclusions of the Commission based upon such findings are presumed to be well founded and correct, and they will not be set aside unless error clearly appears."

The Circuit Court of Appeals overruled the Circuit Court, citing the Georgia Commission cases, and remanded the case to the Circuit Court with instructions to set aside its decree

and to dismiss the application without prejudice to the right of the Commission to proceed and to determine the controversy according to law. The Commission, however, appealed to the Supreme Court, which affirmed the action of the Circuit Court of Appeals. The following statement of the theory of rate-making which resulted in the use of the combination based upon Atlanta, rather than upon a point through which the traffic was actually carried, appears in the opinion of the Supreme Court.

"The sum of the rate to LaGrange was arrived at by charging the low rate produced by competition at Atlanta, and adding thereto the sum of the local rate back from Atlanta to LaGrange. The same rule was applied to the stations between LaGrange and Atlanta, each of those stations receiving, therefore, a somewhat lower rate than La Grange, although they were located a greater distance from New Orleans and nearer Atlanta. The sum by which the rates from New Orleans to these respective stations between LaGrange and Atlanta were lower than the LaGrange rates, was dependent upon the distance these respective stations were from Atlanta. It was shown, however, and is unquestioned, that, except in a particular to which we shall have occasion hereafter to refer, if the charge had been based on the nearest competitive point south of LaGrange—that is, Montgomery—and there had been added to the competitive rate to Montgomery the local rate from Montgomery to LaGrange and the other stations beyond, the freight rates on shipments from New Orleans to LaGrange

would have been much greater than the rates now complained of as excessive. In other words, the railroads, instead of putting out of view the competition prevailing at Atlanta, when they fixed the rates to the non-competitive points, took the low rates prevailing at Atlanta, as a basis, and added thereto the local rate from Atlanta, the result being that the places in question were given the advantage resulting from their proximity to Atlanta, the competitive point, in proportion to the degree of such proximity."

Continuing, the Supreme Court said:

"When the situation just stated is comprehended, it results that the complaint in effect was that a method of rate-making had been resorted to which gave the places referred to a lower rate than they otherwise would have enjoyed. In this situation of affairs, we fail to see how there was any just cause of complaint. Clearly, if, disregarding the competition at Atlanta, the higher rate had been established from New Orleans to the non-competitive points within the designated radius from Atlanta, the inevitable result would have been to cause the traffic to move from New Orleans to the competitive point (Atlanta), and thence to the places in question, thus bringing about the same rates now complained of. It having been established that competition affecting rates existing at a particular point (Atlanta) produced the dissimilarity of circumstances and conditions contemplated by the 4th section of the Act, we think it inevitably followed that the railway companies had a right to take the lower rate prevailing at

Atlanta as a basis for the charge made to places in territory contiguous to Atlanta, and to ask, in addition to the low competitive rate, the local rate from Atlanta to such places, provided thereby no increased charges resulted over those which would have been occasioned if the low rate to Atlanta had been left out of view. That is to say, it seems incontrovertible that in making the rate, as the railroads had a right to meet the competition, they were authorized to give the shippers the benefit of it by according to them a lower rate than would otherwise have been afforded. True it is, that by this method a lower rate from New Orleans than was exacted at LaGrange obtained at the longer distance places lying between LaGrange and Atlanta, but this was only the result of their proximity to the competitive point, and they hence obtained only the advantage resulting from their situation. It could be no legal disadvantage to La Grange, since, if the low competitive rate prevailing at Atlanta had been disregarded, and the rate had been fixed with reference to Montgomery, and the local rate from thence on, the sole result would have been, as we have previously said, to cause the traffic to move along the line of least resistance to Atlanta, and thence to the places named, leaving LaGrange in the exact position in which it was placed by the rates now complained of.

"It is to be observed that it is shown that the local charges on freight moved between Atlanta and La Grange and the stations intermediate—all of the points being in the State of Georgia—conformed to the requirements of the Georgia State Railroad Commission."

The Supreme Court further expressed the opinion that:

"* * * there was nothing in the evidence taken before the Commission to lend support to the finding that the rates to LaGrange were intrinsically unreasonable, * * *"

Griffin Case.*

"Shall government undertake the impossible, but injurious, task of making the commercial advantages of one place equal to those of another?"—Decision of the Circuit Court in this case.

The complainants before the Commission, wholesale and retail grocers in the city of Griffin, Georgia, contended that the rates to that point from Cincinnati and Louisville were in violation of the long and short haul clause because they were higher than on like freight carried through Griffin to Macon. They also alleged that the rates to Griffin were unreasonable in themselves and relatively so as compared with rates to Macon. The defendants denied that the rates to Griffin were unreasonable in themselves, that they discriminated unjustly as between Griffin and Macon, and asserted that the Fourth section was not violated because

* Brewer & Hanleiter *vs.* Louisville & Nashville Railroad Company *et al.;* Interstate Commerce Commission (7 Inter. Com. Rep. 224), decided June 29, 1897. Brewer *et al. vs.* Central of Georgia Railway Company *et al.;* Circuit Court, Southern District of Georgia, Eastern Division (84 Fed. Rep. 258), decided January 8, 1898.

dissimilar circumstances and conditions controlled the rates to the respective points. The opinion of the Commission discloses the fact that no evidence was introduced in support of the contention that the rates to Griffin were in themselves excessive or unreasonable. Several witnesses testified that they were reasonable. The Commission further said that the question whether there was unjust discrimination against Griffin and in favor of Macon "is probably a question of law, depending upon the other facts herein found." The far greater portion of the opinion, and apparently of the testimony, was devoted to the question whether there existed the substantial dissimilarity of conditions and circumstances, as between Griffin and Macon, necessary to render the long and short haul clause inapplicable. The following are extracts from the report and opinion of the Commission:

"Atlanta is what is called, in the parlance of southern rate-making, a basing point. Griffin is not a basing point. The rate to Griffin is made by adding to the Atlanta rate the local rate from Atlanta to Griffin. Macon is also a basing point, and the rate to Macon and Atlanta is in most instances the same. * * * The defendants contended in the first place that the rates to Macon were affected by water competition. Macon is situated upon the Ocmulgee river. The Altamaha river is formed by a junction of the Ocmulgee and Oconee rivers, and empties into the ocean between Savannah and Brunswick. Regular lines of freight

and passenger steamers run between both of these ports and New York City. Lines of railway also lead from both Savannah and Brunswick to Macon, and freight is carried by ocean and rail from New York to Macon over these lines of railway upon a joint through rate. * * * The defendants also claimed that competition between railroads and markets created the necessary dissimilarity of circumstances and conditions. Five independent lines of railway enter Macon. These lines through their different connections by rail, and by rail and water, reach all parts of the United States and actively compete for business from all available directions.

"By means of these railway lines the markets in all parts of the United States are brought into connection with Macon, and many of those markets seek a rate which will enable them to dispose of their various products in Macon. Under the present adjustment of rates, the supplies consumed in Macon are obtained both from the eastern and from the western markets. * * * The defendants insisted that the Macon rate was made by conditions over which they had no control, and that it was beyond their power to alter this rate. If the Macon rate was fixed and they had no right under the law to make higher rates to intermediate points between Macon and Atlanta, then one of two things must happen, either they must raise their rate to Macon, and so entirely lose that competitive business, or they must lower their rates to intermediate points and so lose the difference between the present rates and the Macon rate; and the Central of Georgia Railway insisted that in either case its revenues would be unwarrantably crippled. * * *

We hold upon the findings before us that Griffin is entitled to as low a rate from Louisville and Cincinnati as is Macon, and that the charge of a higher rate is an unjust discrimination under Section Three. * * * Are the rates complained of in violation of the 4th section? Confessedly they are, unless justified by dissimilar circumstances and conditions.

"The defendants rely upon water competition to make out the necessary dissimilarity, but there are no facts in the case upon which to base that contention. * * * The defendants also rely upon competition between railroads and markets. This competition does undoubtedly exist in a most active form, and is the controlling factor in making the Macon rate; but that it creates such dissimilarity of circumstances and conditions as will justify the carrier in charging more for the short than for the long haul without an order of this Commission is no longer an open question with us. * * * If by the reduction of the rate to intermediate points the revenue of the Central of Georgia Railway Company will be unwarrantably lessened—and upon that question we express no opinion—then the defendant should readjust its rates by raising the Macon rates sufficiently to offset the reduction to intermediate points, and thereby remove the present unjust discrimination. Its answer is that it could not, if it would, do this; that the Macon rate is beyond its power to modify. The Macon rate is the result of agreement. The Central of Georgia Railway Company is a party to that agreement, and has the same power over it that every other party has. If it has not sufficient influence to secure the adoption of such rates as

will, under the law, yield to it a proper revenue, that is the misfortune of those who have become the owners of this property, which must be endured as every other misadventure of business is."

In accordance with the opinion containing the foregoing the Commission ordered the defendants to "cease and desist" from charging more to Griffin on shipments from Cincinnati and Louisville, than to Macon. This order the Circuit Court refused to enforce, declaring that it was not a "lawful order." The Court said, in part:

"There is no contention that the Macon rates are in themselves unreasonable. By what specific charge, and by what specific facts, then, is the finding of unjust discrimination supported? Not, certainly, by the mere fact that the Griffin rate is higher and the Macon rate is lower. There can be no unjust discrimination of which commissions and courts can take cognizance, * * * unless it also be an unlawful discrimination. To have merited the animadversions of the Commission, these rates relative to these two Georgia cities must have been denounced by positive law, or its necessary implications.* * * * * There are many circumstances and conditions at the important distributing point Macon

* The Court quoted here from the opinion of the Commission, written by Judge Cooley, *in re* Louisville & Nashville. The extract selected by the Court includes the following: "The courts and the commissions of the United States must look to what is expressed or necessarily implied by the law for their authority to decide issues, and thus ascertain and determine the rights of contending parties."

affecting railroad rates which do not exist at Griffin, * * * It cannot be doubtful that it is easily feasible for Macon merchants to confront the railroads with water competition, * * * But water transportation is not the important element of that strenuous competition between carrier and carrier and market and market which makes the conditions and circumstances at Macon so dissimilar from those at Griffin. It is perhaps enough to point out that the Commission reports this competition to exist in its most active form. To test the extent of these dissimilar conditions, I have but to point to what would be the result if the Macon rates were advanced to equal the Griffin rates. Railroad competition at Macon exceeds that at Griffin as the competing roads which center at Macon exceed the competing roads which pass Griffin, and the competition of markets which Macon merchants are compelled to meet is far greater than that which confronts the Griffin merchants. To illustrate, Macon competes with Savannah for the trade of much of the country traversed by the main line of the defendant company. It competes with Eufaula and Columbus on the Southwestern Railroad and its several branches, and the several other lines reaching the city with numerous markets and communities, none of which the merchants of Griffin can reasonably hope to reach. It is evident, therefore, that, since these competitive markets have, many of them, equal advantages in rates with Macon, if there be an advance in the cost of transportation, the commerce of Macon would be destroyed in exact proportion with its inability to meet the prices of its competitors. While this is true, the producers and consumers at Griffin would not be

benefited by the advance of Macon rates. * * * Analyzing the proposition of the complainant, made, it seems to me in disregard of the dissimilar circumstances and conditions existing at Macon, it would, if successfully maintained, result in the destruction of the immense wholesale and retail commerce of Macon upon which thousands depend for their daily livelihood, which serves a vast territory, and the increment of which adds thousands annually to the aggregate wealth of the State, in order to give a possible benefit to a few Griffin merchants. Even this advantage to the merchants of Griffin is scarcely more than problematical. Griffin, with equal rates, could not successfully compete with Macon, unless it could approximate its large supply of capital, so essential to modern commerce. * * * The effect on the defendant company would also be damaging, perhaps incalculably so, * * * how stands the trivial and problematical advantage which Brewer & Hanleiter, and perhaps other Griffin merchants, might obtain by increasing the Macon rates, when compared to the stupendous disadvantage which would almost certainly result to the latter community and to one of its principal railroads, if the competition of carrier with carrier and market with market, ever present there, should be ignored by the courts? Shall the authorities of government have no concern for the safety of millions of capital invested or accumulated through long years of enterprise and diligent business exertion by the people of the latter city? Shall the millions they have invested in railroads from their own means, to afford to the State great systems of transportation, result in their ruin? Shall government undertake the impossible, but injurious

task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or those legitimate rewards which flow from large investments, business industries, and competing systems of transportation to facilitate and increase commerce. The Act to regulate commerce has no such purpose, and yet this appears to be the inevitable result of the relief the complainants seek in this case. * * * The application is for a temporary injunction, the first effect of which would be to immediately disorganize and disarrange the entire commerce of which Macon is the receiving and distributing point, with the more injurious consequences to which I have already adverted."

No appeal was taken from this decision.

Spokane Falls Case.*

"*The lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute.*"—*Decision of the Supreme Court in the "Chattanooga" case.*

* The Merchants' Union of Spokane Falls *vs.* The Northern Pacific Railroad Company, and the Union Pacific Railway Company; Interstate Commerce Commission (5 I. C. C. Rep. 478), decided November 28, 1892. Farmers' Loan & Trust Company *vs.* Northern Pacific Railway Company, *in re* Holly *et al.;* Circuit Court, District of Washington, Northern Division (83 Fed. Rep. 249), decided October 16, 1897.

The original complaint in this case was filed with the Commission on April 2, 1889, and the Commission's decision was rendered on November 28, 1892, three years, seven months and twenty-six days thereafter. Application to the Circuit Court to enforce the order was made sometime in 1894, and the decision of that Court, refusing to enforce the Commission's order, was rendered on October 16, 1897.

The complainants before the Commission charged that rates to Spokane Falls were unreasonable in themselves and also so adjusted with relation to the rates to Portland, Tacoma, Seattle, Ellensburg and Missoula as to discriminate unjustly against Spokane Falls. It was also claimed that the practice of carrying traffic through Spokane Falls to Portland, Tacoma and Seattle for lower rates than were charged for contemporaneous shipments of similar freight destined to Spokane Falls constituted a violation of the long and short haul clause. The defendants denied all the allegations of injustice and asserted that the through rates to Portland, Tacoma and Seattle were forced by competition, both by ocean carriers and by the Canadian Pacific Railway, which did not exist at Spokane Falls. The Commission concluded that this competition was actual and sufficient in force to create substantially dissimilar circumstances and conditions within the meaning of the law. On this point the Commission said:

"The circumstances and conditions under which through transportation is effected over the lines of the Northern Pacific to its western terminals are substantially different from those attending like transportation to Spokane, such dissimilarity consisting in the competition at these terminal points of carriers not subject to the Act. To what extent this competition is created by the rates made and traffic secured by the Canadian Pacific road does not very clearly appear. The known facts concerning that road, however, are not wanting in significance. It is a foreign railroad, chartered and subsidized by a foreign government and not directly amenable to the regulating authority of Congress. It extends entirely across the continent at no great distance from our Northern border, and is so located and connected with domestic lines as to constitute a prominent factor in all questions of transportation between the eastern and western sections of the United States, * * * we are constrained to hold that water competition of controlling force, and affecting a variety of traffic important in character and amount, actually exists at these several terminals, and that such competition taken in connection with the competitive position and attitude of the Canadian Pacific road, justifies the defendants in accepting less compensation on eastern shipments to the cities of Portland, Tacoma and Seattle than they may lawfully charge on like shipments to the intermediate city of Spokane."

The Commission, however, was of the opinion that some of the rates to the Pacific coast cities named were lower than was necessary to prevent the business going to ocean car-

riers and took the interesting position that to proportion the charges on articles not likely, in any event, to be carried by water to those made necessary by water competition for articles that could easily be diverted to the ocean routes is not permissible under the law. The logical result of this position would have been an order requiring advances in many of the rates to the cities indicated. The Commission said:

"Nothing but the stress of unavoidable competition can legalize the inequality resulting from higher rates for shorter than for longer hauls. It is evident, therefore, that no article should be carried to terminal points at commodity rates, which if the class rates were imposed, would still seek rail rather than water transportation. * * * Theoretically it would be suitable to examine the entire list of commodities with the view of ascertaining which of them in fact are practically adapted to ocean carriage, and to restrict the defendants in making lower terminal rates to such articles as are actually subject to water competition."

The conclusion that competition justified lower rates on certain articles when shipped to the Pacific coast than when shipped to Spokane Falls, did not, in the view of the Commission, warrant the adjustment which it found to exist. The rates to Spokane Falls were declared to be excessive by comparison with these applied to traffic not subject to water competition, although destined to coast points. The rates on the several "classes" of freight (articles not taking special

commodity rates) then being the same to Spokane as to Portland, Tacoma and Seattle the Commission ordered a reduction of 18 per cent and decided that the rates to Spokane on traffic of kinds not subject to competition when destined to the coast should not exceed 82 per cent of the rates to coast points. The Commission supplemented these conclusions by the following:

"It is quite apparant that a reduction of Spokane rates in compliance with this decision will require some modification in rates to shorter distance points to avoid infraction of the long and short haul clause of the statute. This will especially be the case on the line of the Union Pacific between Pendleton and Spokane, to both of which towns the rates on that road are the same. The lines of the defendants in this territory are practically parallel, the Northern Pacific reaching Pendleton through Spokane, and the Union Pacific reaching Spokane through Pendleton; but whatever embarrassment may result from this situation must be met in the first instance by the railroads themselves."

The Circuit Court, which was appealed to for the enforcement of the Commission's order, found that it was "so inherently defective that it cannot be enforced" and the Master in Chancery selected to investigate the case reported:

"That the rates from Eastern terminal points to Spokane are reasonable in themselves, and relatively reasonable on all classes of goods."

No appeal from this decision was taken.

Cattle Raisers' Association Case.*

*"There can be no possible view of the case by which the conclusion that the rates were unjust and unreasonable can be sustained. * * * the order of the Commission was not sustained by the facts upon which it was predicated."—Decision of the Supreme Court in this case.*

On June 1, 1894, a switching charge of $2 was imposed by the railways centering in Chicago upon shipments of cattle and other live stock, destined to that city. The complainant, an association of cattle owners and producers, with members in the States of Texas, Kansas, Montana, North Dakota, South Dakota and in the Indian Territory, complained to the Commission that this addition made the rates to Chicago excessive and unreasonable, to the extent of $2. They also asserted that no such charge was made at East St. Louis, Kansas City or Omaha; that there was no switching

* Cattle Raisers' Association of Texas *vs.* Fort Worth & Denver City Railway Company and others; Interstate Commerce Commission (7 Inter. Com. Rep. 513), decided January 20, 1898. Interstate Commerce Commission *vs.* Chicago, Burlington & Quincy Railroad Company *et al.;* Circuit Court, Northern District of Illinois, Northern Division (98 Fed. Rep. 173), decided December 4, 1899. Interstate Commerce Commission, Appellant, *vs.* Chicago, Burlington & Quincy Railroad Company *et al.;* Circuit Court of Appeals, Seventh Circuit (103 Fed. Rep. 249), decided June 15, 1900. Interstate Commerce Commission, Appellant, *vs.* Chicago, Burlington & Quincy Railroad Company *et al.;* Supreme Court (186 U. S. 320), decided June 2, 1902.

charge in Chicago on "dead" freight, and that consequently this charge amounted to an unjust discrimination in favor of the other cities named, and also in favor of "dead" freight. The relief asked for was an order commanding the defendants to desist from enforcing this charge and reparation for the amount thus collected from the members of the Association. Those of the defendants whose lines did not reach Chicago, denied that they had any share in the imposition of this switching charge, and declared that they did not receive any portion of it in the division of the through rates. The lines entering Chicago asserted that, previous to June 1, 1894, the Union Stock Yards and Transit Company, in order to attract business to its yards, had rendered service over its tracks without exacting any terminal charge; that at the time the charge was imposed the rate to Chicago had become unreasonably low; that on and after that date the Stock Yards company insisted upon a trackage payment of from 80 cents to $1.50, and that after paying these charges the balance of the $2 switching charge did not leave enough to pay the actual cost of switching. They denied that there was any illegal discrimination or any violation of the Interstate Commerce law. The Commission, having been admonished by the Supreme Court that its authority does not extend to prescribing a rate for the future (see Interstate Commerce Commission *vs.* Cincinnati, New Orleans and Texas & Pacific, 167 U. S. 479), merely ordered the defendant

carriers "to cease and desist" from charging and collecting the charge of $2 but did not refrain from saying that "our judgment is, therefore, that the exaction of a terminal charge of more than $1 per car is in violation of the First and possibly the Third section of the Act, and that the defendants ought not to exact more than this sum." The order in this case was passed upon successively by the Federal Circuit Court, Court of Appeals, and the Supreme Court, and in no case was it approved. The following is from the decision by Judge Kohlsaat, who delivered the opinion of the Circuit Court:

"Prior to the year 1893, the Stock Yards company, which owns or controls the tracks required for the movement of freight between the tracks of the several defendants and the stock yards, had given to the defendants the free use of said tracks; the carriers being at the expense only of the actual cost of haulage and handling. In 1893 the Stock Yards company assumed the entire work of hauling cars from the intersection of said stock yards tracks with defendants' lines, respectively, to the yards, and charged the defendants therefor on the basis of what it had cost defendants theretofore for the same service. On June 1, 1894, the Stock Yards company added to this sum a trackage charge of 40 cents per car each way, then for the first time imposed. Partly to meet this new expense, and partly to reimburse themselves for the actual outlay theretofore borne by them in delivering at the stock yards, the defendants, respectively, by concerted action, duly filed schedules of new rates to that

point, with the commission, as required by the act, whereby they created a rate to points on their lines in Chicago, and a terminal charge to cover the expense of delivering stock from their tracks to the said stock yards. This terminal charge was fixed at $2 per car. The trackage charge above referred to amounted to the sum of 80 cents per car. Thus the former through rate to the stock yards, taking the Chicago and terminal rates together, was arbitrarily increased in the sum of $1.20 per car. Since that time the Chicago rate has been greatly reduced, so that the question now presented is whether the imposition of the terminal charge of $2 upon the theretofore existing Chicago rate was unlawful and unjust.

"Upon the hearing of defendants' demurrers to said petition (94 Fed. 272), this court held that it was entirely within the power of petitioner, in a proper case, to require the defendants to cease and refrain from the enforcement of a freight rate which the petitioner found to be unjust and unlawful, even though the Commission has no power to prescribe a rate. Manifestly, if the defendants did effect a segregation of their freight charges from Missouri river and other stock-shipping centers to the Chicago stock yards, so that the Chicago rate did not include the expenses or charges incurred in the delivery at the stock yards from the tracks of defendants, and did make a special rate from their tracks to the stock yards, there can be no question of double charge involved. Unless the one or the other of these charges, in and of itself, is unjust and unlawful, or the same was illegally made, the petitioners' contention must fail. The justness and fairness of the Chicago rate is not called in question in this proceeding.

"The act provides in what manner rates may be changed. The defendants have complied with that requirement, and there can be no doubt that they have, as they legally might, divided up or segregated their Chicago and terminal charges. That such segregation could have been legally accomplished, and was both advisable and desirable, was unequivocally held in the case of Walker *vs.* Keenan, 19 C. C. A. 668, 73 Fed. 758. This, too, is the spirit of the Covington Stock Yards case, 11 Sup. Ct. 461, 35 L. Ed. 37. It is just and reasonable that one who ships to points on the tracks of the several defendants in Chicago should not be required to pay a rate which is based in part upon the actual cost to the carrier of delivery at the stock yards from the point to which he ships. He should not be required to go to the stock yards to get his money's worth.

"Therefore, the only question remaining is as to the lawfulness and justice of this terminal charge, in and of itself. The petitioner admits that, if it is to be considered by itself, it must be held to be reasonable, and therefore just and lawful. Having held that it must be so considered, there remains no alternative but to deny the prayer of said petition, and the same is denied. In view of the above, it becomes unnecessary to pass upon the question as to whether or not this cause is properly within the Interstate Commerce act."

It will be noted that the Circuit Court in rendering the opinion from which the foregoing is an extract, confined itself wholly to a discussion of the facts and expressly refrained from considering whether the order, if it could have been

held to be consistent with the facts, was one which the Commission had power to make. The following is from the opinion of the Circuit Court of Appeals, delivered orally by Mr. Justice Brown:

"While I do not think railway companies would be bound to furnish terminal facilities of this kind for an occasional horse, or perhaps even for an occasional and wholly exceptional car load of live stock, yet, if cattle became a substantial part of the traffic, I have no doubt provision should be made for their reception.

"In 1865 the Union Stock Yards were organized, a large area of lands purchased, and separate tracks laid by the stock yards company, connecting with practically all the railways running to Chicago. From this time the demand for separate terminal facilities at each of these railways seems to have ceased, and all cattle were consigned for delivery at the stock yards,—not for the purpose of being claimed there by the consignee, but for the purpose of finding a market for them. Here all the cattle consigned to Chicago are deposited for slaughter or for further shipment, and great slaughtering houses have been erected in the vicinity of the yards for the disposition of the cattle. Providing a market for cattle is certainly no part of the business of the railway company; and I think, therefore, any extra expense occasioned from the time the cars containing the cattle leave the tracks of the company, and until they arrive at the stock yards and the empty cars are returned, the company is entitled to make an additional terminal charge, equivalent to the expense occasioned to it by pro-

viding these extra facilities. Prior to June 1, 1894, the railway companies seemed to have assumed this burden themselves, but at this time a trackage was imposed by the stock yards of from 40 to 75 cents each way upon every car going and returning to the tracks of the railway company to the stock yards. It is insisted that, as this is the only extra expense then occasioned, any charge beyond that was unreasonable and improper. I do not think that necessarily follows. While the imposition of this trackage charge by the Union Stock Yards was doubtless the immediate occasion for a reformation of its traffic, the railway companies were then at liberty to adopt a new schedule with relation to these terminal facilities, and charge what they actually cost them.

"The evidence is that it costs some railways a trifle less than $2, and some considerably more than that. The average seems to have been somewhat more than $2. But we think it was proper for the railway companies, whether the expense to the companies were a few cents more or less, to adopt this amount as an approximate charge, and that their action in so doing should be sustained."

The Supreme Court unanimously confirmed the decree of the Circuit Court of Appeals, in an elaborate opinion in which the court clearly indicated its belief that the Commission's order was not justified by the facts.

"It needs no reasoning to demonstrate that the Commission correctly held that the mere imposition by the stock yards company of a new burden, averaging $1 per car, did

not justify an additional charge by the carriers of $2 per car. It is likewise equally plain that if the prior rate was just and reasonable, as the Commission found it to be, that the addition, without reason, of $1 per car, caused the rate to become unjust and unreasonable to the extent of the $1 extra.

"It follows that the order of the Commission was right if its correctness depends upon the considerations previously stated. But such is not the case. In the report on the original hearing the Commission said:

"'If the through rate were what was really aimed at by the complaint, then all ground of complaint has been removed since the complaint itself was filed. About October the 1st, 1896, rates on live stock from points embraced in the territory covered by this complaint to all western markets, including Chicago, were reduced 5 cents per 100 pounds. This would amount to from $10 to $15 per car. Therefore the Texas shipper would actually deliver his stock in Chicago for from $8 to $13 per car load cheaper than he could before the $2 rate was imposed, and all the complaint asks for is the abolishment of that terminal charge. This charge is imposed by the terminal carriers at Chicago, and those carriers receive and retain the amount of that charge. The complaint is that this charge is an unlawful one; that no matter what the Chicago rate may be the addition of this particular sum to that rate is in violation of the Act to regulate commerce.'

"In other words, it was held that the rate, which was unjust and unreasonable solely because of the $1 excess, continued to be unjust and unreasonable after this rate had been reduced by from $10 to $15. This was based, not upon

a finding of fact,—as of course it could not have been so based,—but rested alone on the ruling by the Commission that it could not consider the reduction in the through rate, but must confine its attention to the $2 terminal rate, since that alone was the subject-matter of the complaint. But, as we have previously shown, the Commission, in considering the terminal rate, had expressly found that it was less than the cost of service and was, therefore, intrinsically just and reasonable, and could only be treated as unjust and unreasonable by considering 'the circumstances of the case;' that is, the through rate, and the fact that a terminal charge was included in it, which, when added to the $2 charge, caused the terminal charge as a whole to be unreasonable. Having therefore decided that the $2 terminal charge could only be held to be unjust and unreasonable by combining it with the charge embraced in the through rate, necessarily the through rate was entitled to be taken into consideration if the previous conclusions of the Commission were well founded. It cannot be in reason said that the inherent reasonableness of the terminal rate, separately considered, is irrelevant because its unreasonableness is to be determined by considering the through rate and the terminal charge contained in it, and yet when the reasonableness of the rate is demonstrated, by considering the through rate as reduced, it be then held that the through rate should not be considered. In other words, two absolutely conflicting propositions cannot at the same time be adopted. As the finding was that that both the terminal charge of $2 and the through rate as reduced when separately considered was just and reasonable, and as the further finding was that as a conse-

quence of the reduction of from $10 to $15 per car, the rates, considered together, were just and reasonable, it follows that there can be no possible view of the case by which the conclusion that the rates were unjust and unreasonable can be sustained." * * *

"Being then constrained to the conclusion that the order of the Commission was not sustained by the facts upon which it was predicated, we cannot enter into an independent investigation of the facts, even if it be conceded, the record is in a condition to enable us to do so, in order that new and substantive findings of fact may be evolved, upon which the order of the Commission may be sustained."

Danville Case.*

"The Danville rates are not unreasonably high."—Decision of the Circuit Court in this case.

The complainants in this case asked the Commission to order a readjustment of the following rates to and from Danville:

* City of Danville and others *vs.* Southern Railway Company and others; Interstate Commerce Commission (8 Inter. Com. Rep. 409 and 571), decided February 17, 1900; petition for rehearing dismissed November, 17, 1900. Interstate Commerce Commission *vs.* Southern Railway Company; Circuit Court, Western District of Virginia (117 Fed. Rep. 741), decided August 4, 1902. Interstate Commerce Commission, Appellant, *vs.* Southern Railway Company; Circuit Court of Appeals, Fourth Circuit (122 Fed. Rep. 800), decided May 5 1903.

"First, those to Danville from northern and eastern cities; second, rates on sugar, molasses, rice and coffee from New Orleans to Danville; third, rates from certain western points to Danville; fourth, the rate on tobacco from Danville to western points."

There appears to have been no suggestion that the rates questioned were excessive or unreasonable in themselves, but it was urged that they were unreasonable in comparison with those to Richmond and Lynchburg, particularly the latter. The case was heard and considered by the Commission as though the Southern Railway were the sole defendant. The position of that railway, as reported by the Commission, was as follows:

"The Southern came into this field of competition last of all. When that company determined to compete for this traffic it simply met the rates of the Chesapeake & Ohio and the Norfolk & Western which were already in effect, and this is all it has ever done. It has not reduced the Richmond or Lynchburg or Norfolk rate. It has not raised the Danville rate. It has in no way intensified the discrimination against Danville, but has simply left the situation where it found it. By entering this competitive field it did not injure Danville; to withdraw from it would not benefit Danville. The business is a source of some profit to the Southern company; therefore, that company should be allowed to continue in it."

The disposition of the case by the Commission is indicated by the following extract from its report and opinion:

"We think that under all the circumstances and conditions the rate to Lynchburg may properly be somewhat lower than the rate to Danville. We do not think that the present difference in rates is justifiable; or, in other words, we do not think that the circumstances and conditions justify the rates now in force. It is our opinion that rates from northern and eastern cities to Danville and rates from New Orleans upon the commodities mentioned in the complaint to Danville should not exceed those to Lynchburg by more than 10 per cent, and that rates between Danville and the west should not exceed those between Lynchburg and the west by more than 15 per cent. This also applies to the rate on tobacco from Danville to Louisville. It may well be called outrageous to impose upon the chief industry of Danville a rate from Danville to Louisville 15 cents above the rate from Lynchburg to Louisville, when the difference in rates upon that class of merchandise in the reverse direction is only 2½ cents.

"Our conclusions being as above indicated, the question arises, What order can be made? We find that circumstances and conditions are different at Danville than they are at Lynchburg, and that that difference might justify a higher rate at Danville, but that there is no dissimilarity of circumstances and conditions that justifies the present rate. The decisions of the United States Supreme Court leave our power under the Fourth section in such a case somewhat doubtful. That court decides apparently that the question is not whether there is a difference in circumstances and conditions, but whether there is a sufficient difference to warrant the lower rate at the more distant point. The

same reasoning would apparently lead to the conclusion that we might inquire whether the circumstances and conditions were so different as to warrant the rate actually in effect. For the purposes of this case we hold that the interpretation last suggested is the true one, and that inasmuch as the rates considered by us are not justified by competitive circumstances and conditions they are unlawful under the Fourth section.

"This question is not, perhaps, of much practical importance. The complaint alleges that the defendant by maintaining these rates not only violates the Fourth but also the third section of the Act, in that it creates and continues an unjust discrimination against Danville as compared with Lynchburg. We have found that the discrimination exists. We have found that it is without justification. It is, therefore, an unjust discrimination under the Third section, which must be prohibited. There is some question here as to whether this Commission has power to determine definitely for the future the relation in rates which should exist between Danville and Lynchburg, but unless these rates are adjusted in substantial accordance with the views hereinbefore expressed, we shall attempt to do so.

"The testimony in this case was general, having reference to no special commodity except tobacco, sugar, molasses, rice and coffee. It may happen that the percentage of difference in rates between Lynchburg and Danville should be greater in case of some commodities than in others. The carriers themselves can make this readjustment in a much more satisfactory manner than can this Commission, and

we have concluded to make no further order in the premises at present, in the hope that such a voluntary readjustment will be undertaken. If by May 1, next, the defendant has not put into effect rates substantially in accord with the views here indicated, we will then consider the matter further, and make some definite order in the premises."

The defendants, on April 27, 1900, applied for a rehearing, but this petition was denied by a decision rendered on November 17, of the same year. In denying this petition, however, the Commission extended the time for compliance with its recommendations to December 31, 1900, saying:

"No order will be made until December 31, 1900. If the Southern Railway signifies by that time its disposition to endeavor to make this readjustment, such further time will be allowed as may be reasonably necessary. Otherwise an order will then issue in the premises."

An order finally having been issued and not complied with an application for its enforcement was made and denied. The Circuit Court said, in part:

"The evidence in this case leaves no room for doubt that the competition at Lynchburg (as well as at Richmond), is real and substantial; that it comes about mainly, if not entirely, from conditions not within the control of the defendant; and that there is a modicum of profit to the defendant in transporting freight to and from Lynchburg and Richmond. It follows that in reaching a conclusion in this

case adverse to the defendant the rates to and from Danville must be held unreasonable in and of themselves. If reasonable, they cannot be held to subject Danville to an undue prejudice, or to give Lynchburg an undue preference, merely because the Lynchburg rates are considerably lower. * * * Whether or not the Danville rates are reasonable *per se* is a question that has given me no small amount of trouble. * * * The effect of the present rates on the growth and prosperity of Danville is worthy of careful consideration. * * * If the testimony for the complainant had shown that Danville had not prospered as it should have done, or that its trade territory had been reduced, in comparison with other cities where competition had not produced unusually low rates, and where the circumstances are otherwise similar to those at Danville, it would be proper to conclude from such testimony that the Danville rates are too high. But such testimony was not offered. * * * It is difficult to conceive of any interest that the defendant could have to unduly prefer Lynchburg and oppress Danville, for the defendant has practically the whole of the transportation to and from Danville, and only a portion of that to and from Lynchburg. * * * If we consider the income derived from the whole system of the Southern Railway Company, there is no doubt left by the evidence that its earnings are rather less than a fair return. * * * The inconclusive and unsatisfactory results, and the inherent difficulties in applying the above mentioned tests, have led me to the conclusion that the most satisfactory test to be applied in this case is to compare the Danville rates with those in force at numerous other cities and

towns in the South, where the circumstances are as nearly as may be similar to those at Danville. * * * The result of comparison between these rates and the Danville rates is the conclusion that the latter compare favorably with the former. * * * As judged, then, by this last test, I am led to the conclusion that the Danville rates are not unreasonably high."

The Circuit Court, therefore, refused to enforce the Commission's order. This refusal was affirmed by the Circuit Court of Appeals, which, after quoting approvingly from the opinion of the Circuit Court, said, in part:

"It being, therefore, ascertained that the low rates to Lynchburg and Richmond are due to active, legitimate competition, and that the local rates charged by the Southern Railway Company, from Lynchburg to Danville are not within themselves unreasonable, we are of the opinion that the principles of law as above stated apply, and the judgment of the Circuit Court is affirmed."

An appeal to the Supreme Court, in this case, is now pending.

Savannah Naval Stores Case.*

*"It is not so much the difficulty of the law as it is of its administration. * * * The Commission * * * I think, has put on the robes when, perhaps, it ought to have worn the overalls."—Judge Grosscup, speech before Economic Club of Boston, on March* 11, 1905. *Reported in "Freight" for April,* 1905.

In this case the Circuit Court directed obedience to the Commission's order and the defendant railways did not appeal.

Wilmington Case.†

"There are sufficient reasons for dissimilarity in rates."—Decision of the Circuit Court in this case.

The complainant before the Commission alleged that the defendant's rates for the transportation of freight from

* Savannah Bureau of Freight and Transportation *et al. vs.* Louisville & Nashville Railroad Company *et al.;* Interstate Commerce Commission (8 Inter. Com. Rep. 377), decided January 8, 1900. Interstate Commerce Commission *vs.* Louisville & Nashville Railroad Company *et al.;* Circuit Court, Southern District of Georgia, Eastern Division (118 Fed. Rep. 613), decided July 1, 1902.

† The Wilmington Tariff Association of Wilmington, North Carolina, *vs.* The Cincinnati, Portsmouth & Virginia Railroad Company *et al.;* Interstate Commerce Commission (9 Inter. Com. Rep. 118), decided December 17, 1901. Interstate Commerce Commission *vs.* Cincinnati Portsmouth & Virginia Railroad Company *et al.;* Circuit Court, Eastern Division of North Carolina (124 Fed. Rep. 624), decided August 10, 1903

Louisville, Cincinnati, St. Louis, Chicago and other points of shipment to Wilmington, North Carolina, were unreasonable and unjust as compared with those from the same points of shipment to Norfolk, Richmond and other Virginia cities. It was alleged that in order not to subject Wilmington to undue prejudice and disadvantage within the meaning of the law, there should be such an adjustment, as between Norfolk and Wilmington, that either rates should be the same to both ports or that the differences should be in proportion to the short line distances or upon a differential basis. The defendants contended that the circumstances and conditions controlling rates at Wilmington and at Norfolk were substantially dissimilar and that while water competition decreases the rates of both ports it is much stronger at Norfolk. The Commission concluded that the rates from Cincinnati and Louisville to Wilmington were not unreasonable as compared with those from the same points to Norfolk, but that the adjustment as between St. Louis, East St. Louis, Chicago and Wilmington on the one hand, and St. Louis, East St. Louis, Chicago and Norfolk on the other, was unduly disadvantageous to those doing business at Wilmington. Its order was that the rates from the three points named should be relatively reasonable and just, and that those from East St. Louis to Wilmington should not exceed 135 per cent of the rates contemporaneously charged from East St. Louis to Norfolk. Issuance of this order was

suspended for forty days after service of the report and opinion of the Commission upon the defendant carriers in order that they might have opportunity to make the adjustment recommended and they were directed in the meantime to file a report of their action with the Commission. The Circuit Court refused to enforce the order of the Commission and the following are extracts from its opinion:

"If competition controls rates—and there is no contention that it should not and does not—Norfolk and Richmond are territorially located to be entitled to trunk line rates, which have been extended to that territory. * * * This trunk line rate is not shown to have been extended to Norfolk and Richmond from any disposition to favor these points or prejudice Wilmington, but on account of the competition referred to, * * * the competition at Wilmington, with one line of steamers and two systems of railroad, is not near so great, active and sharp. If the rule established by the courts in the case cited and others * * * be applied, there are sufficient reasons for dissimilarity in rates, * * * competition fixes freight rates, as it gives life to commerce. * * * As pointed out, the territory north and west of the Ohio river is in a sharply contested section for freights—in the 'trunk line' territory, which has been extended to include Norfolk and Richmond, with their several competing carriers by rail and water—a geographic, traffic and commercial advantage which Wilmington does not enjoy. The one favored more by natural and artificial (constructed) lines of traffic; both enjoying in

proportion thereto their advantages over other points and cities having no water transportation or served by fewer lines of railroad. Courts and commissions must and do recognize these differences, as do carriers in fixing their freight rates."

No appeal was taken by the Commission from the decision of the Circuit Court in this case.

Hampton Case.*

"The fallacy involved is that Hampton, which is an inland place, with no natural advantages, shall be put upon the same footing as Palatka."—Decision of the Circuit Court in this case.

The complainant before the Commission alleged violation of the long and short haul clause of the law, in that rates from St. Louis, Nashville, and Chattanooga to Hampton, Florida, were higher than on shipments of similar freight through Hampton to Palatka, Florida. It was also alleged that the rates in question were unjust and unreasonable in themselves and afforded an undue and unreasonable preference and advantage to dealers in Palatka. The defendants denied that the conditions were substantially

*Board of Trade of the City of Hampton, Florida, *vs.* Nashville, Chattanooga, and St. Louis Railway Company *et al.;* Interstate Commerce Commission (8 Inter. Com. Rep. 503), decided March 10, 1900. Interstate Commerce Commission *vs.* Nashville, Chattanooga and St. Louis Railway Company *et al.;* Circuit Court of Appeals, Fifth Circuit (120 Fed. Rep. 934), decided Feb. 24, 1903.

similar and insisted that the rates to Palatka were controlled by the water route between Jacksonville and Palatka on the St. Johns river. The Commission thought that somewhat higher rates to Hampton than to Palatka were justified, but that the Third and Fourth sections were violated by those then in force. It indicated the opinion that the excess over the Palatka rate on first class freight which could be allowed on traffic destined to Hampton, would not be more than 10 cents per 100 pounds, and that similar differentials should be allowed on the lower classes. This opinion being rendered on March 10, 1900, the Commission said that "no order will be made in this case now. If by May 1, next, the rates in question have been readjusted in substantial accordance with this opinion the complaint will be dismissed; otherwise the order will issue in the premises." The Circuit Court dismissed a petition to enforce the order of the Commission, but without rendering a written opinion. Appeal was taken and the Circuit Court of Appeals affirmed the decree of the Circuit Court. The Court said:

"As we read the opinion of the Commission, filed as an exhibit to the bill, the Commission did not find that the Hampton rates were in and of themselves unreasonable, but found argumentatively that they were too high, not as based upon the matters to be considered in determining such questions, * * * but largely upon a consideration of rates and charges between St. Louis, Nashville, and Chattanooga,

and Jacksonville and Palatka, Florida. The evidence submitted to the Commission, supplemented by all evidence taken in the Circuit Court, is not sufficient for us to find affirmatively that the Hampton rates were in and of themselves unreasonable. * * *

"The bill also charges that the Hampton rates are in violation of section 3 of the Commerce act, in that said rates, taken in connection with the rates of the appellees from the same northern points to Palatka, Florida, give said Palatka an undue preference and advantage over said Hampton, and subject said Hampton to an undue prejudice through this advantage. The basis of this complaint is that goods shipped from St. Louis and Tennessee points to Palatka can be thereafter shipped by Palatka merchants to Hampton, and there sold on an equal footing with the same goods shipped from St. Louis and Tennessee points direct to Hampton, thus enabling the Palatka merchants to compete in Hampton with the Hampton merchants; while the rates as charged will not allow the Hampton merchants to ship goods from St. Louis and Tennessee points to Hampton, and from there to Palatka, to compete in Palatka on the same footing with Palatka merchants. In other words, it is charged as a duty of the Georgia, Florida & Southern Railway Company, the terminal carrier, to make such rates to Hampton and Palatka as will enable the Hampton merchants to compete in Palatka with Palatka merchants dealing in western goods; but it must not be forgotten that the rates to Palatka, which is a competitive point, are made by other carriers with through lines which are not parties to this suit. The fallacy involved is that Hampton, which is an inland

place with no natural advantages, shall be put upon the same footing as Palatka, which is situated upon a stream navigable all the year round, and has, in addition, several through railroad connections. It seems to be clear that the same reasons, in which we concur, which justify the Commission in finding that the defendant carriers can lawfully charge more for the short haul to Hampton than the long haul to Palatka over the same line, sufficiently answer this charge of discrimination."

Orange Routing Case.*

"Equal or equivalent service at equal cost is constantly at the disposal of all who desire it."—Dissenting opinion of Chairman Knapp in this case.

The complainants before the Commission in this case alleged that the Southern Pacific and the Atchison, Topeka and Santa Fe railways had unlawfully agreed to pool their traffic in oranges, lemons, and other citrus fruits originating in Southern California. This allegation was based upon the statement that prior to January 1, 1900, the complainants had exercised without objection from the defendants the

* The Consolidated Forwarding Company *vs.* The Southern Pacific Company *et al.;* The Southern California Fruit Exchange *vs.* The Southern Pacific Company *et al.;* Interstate Commerce Commission (9 Inter. Com. Rep. 182), decided April 19, 1902. Interstate Commerce Commission *vs.* Southern Pacific Company *et al.;* Circuit Court, Southern District of California, Southern Division (123 Fed. Rep. 597), decided June 1, 1903, and (132 Fed. Rep. 829), decided September 6, 1904.

privilege of selecting the routes over which their shipments should be carried to eastern destinations, but that upon the date named the defendants had established a rule which they had since continued to enforce, under which the initial carrier reserved the right to choose the eastern connection to which it would deliver the traffic for shipment to destination. The defendants supported this rule upon the ground that it was necessary to reserve to the initial carrier the right to select the route by which it would forward the traffic in order to secure a discontinuance of the practice of paying rebates. The Commission declared the evidence insufficient to warrant conclusions upon the question whether the defendant carriers maintained a pool of citrus fruit traffic or whether the rates charged were unreasonable and unjust. Four of the Commissioners, however, thought that the practice of denying to the shippers the privilege of selecting the routes beyond those of the initial carriers was illegal, and an order in conformity with this conclusion was issued. This order was sustained by the Circuit Court. When the case was decided by the Commission, the Chairman of the Commission, Honorable Martin A. Knapp, dissented from the view of his colleagues, and issued a strong dissenting opinion. The following quotations from this opinion are extremely significant:

"The tariffs under which the traffic in question is carried contain the following notation: '*In guaranteeing the*

through rate named herein, the absolute and unqualified right of routing beyond its own terminal is reserved to the initial carrier giving the guaranty.' This is in effect a condition upon which the joint through rates are offered, and I perceive no good reason why such a condition may not be lawfully imposed. Connecting carriers are not required to form through routes or establish joint rates. They do so only by voluntary action. They are free to make such arrangements with each other and to discontinue them as and when they see fit. No law compels these privileges to be afforded or prevents their withdrawal. Since through routes and joint rates are wholly in the discretion of the carriers, both as to their establishment and termination, why may they not be offered on condition that the initial carrier shall control the routing?

"The Common Law doctrine upon this point appears to be well settled.

"'At Common Law a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use.' * * *

"The sole ground, apparently, upon which the conclusion of my colleagues rests is that the common-law rule has been changed by the Sixth section of the Act to regulate com-

merce. I am unable to accept such a construction of that section. It certainly contains no express limitation upon the right otherwise concededly enjoyed by the carrier, nor do I find in its provisions anything which takes away that right by implication. For aught I can see, the exercise of the right is entirely consistent with the due performance of every obligation which the Sixth section imposes.

"In my judgment it is technical, if not inaccurate, to say that, if the carrier as a matter of law may control the routing, 'then a route *or tariff* may be available to one shipper but not to another, and open one minute to a shipper but closed the next.' The tariff, that is, *the rate*, between any named points is all the while open and available to every shipper. Carriage to a given destination is continuously offered to all, and for the same charge. There is no granting to one person of a rate to a place and at the same time refusing to another person the same rate to the same place. Equal or equivalent service at equal cost is constantly at the disposal of all who desire it. True, the initial carrier selects the agency beyond its own line for completing the service, but how does that abridge any right which the regulating statute gives to the shipper? * * *

"Of course the carrier must exercise the right of routing in such way as to avoid discrimination between different shippers. That goes without saying. And it is a significant fact in this connection that it was not alleged in the complaints, proved at the hearing or claimed in argument that any actual discrimination between shippers had resulted from the control of the routing by the defendant carriers. This at least shows that it is practicable for car-

riers to comply with the primary requirements of the Act, which enjoin equality of treatment to all shippers, and at the same time, in cases like the one under consideration, exercise the right of routing traffic over connecting lines. To say that the condition contained in these tariffs cannot be enforced without unjust and unreasonable discrimination is to contradict the undisputed testimony in this case and assert a result which concededly has not occurred. * * *

"Disconnected from the privilege of diversion, it is not perceived that the *legitimate* value to the shipper of the right of routing is important. That right is important to the carrier; and this we may properly take into account in deciding to which of them the right belongs.

"As the question turns upon the construction of a statute, we may well consider the bearing of either view upon the general purposes of the Act and the public interests involved. This suggests certain facts which seem to me highly persuasive. Prior to January 1, 1900, the shippers were allowed to route this traffic according to their own pleasure. During that time they secured large sums in rebates which were paid by the refrigerator companies and by eastern connections of the initial carriers. One of these complainants received from this illicit source in the years 1895, 1896, 1898 and 1899 nearly $175,000.00. The amount received in 1897 was not ascertained, but it presumably equaled the average of the four years named. When routing was denied to the shippers, on January 1, 1900, these rebates entirely ceased and have not since been obtained. No explanation was offered to modify the natural inference

from these admitted facts. They illumine the case beyond the need of comment. Under routing by the shippers the law against rate-cutting was flagrantly disregarded; under routing by the carriers this law has been observed. In my judgment the Commission should not seek to enforce a rule of conduct which, as experience shows, may aid illegal practices, unless clearly convinced that the provision in question so requires. If the Sixth section permits a construction, as I am confident it does, which lessens inducement and opportunity for offensive wrongdoing, that construction should be adopted. And if the Commission has any discretion in the premises, as I think it has, its discretion ought not to be exercised in favor of the confessed beneficiaries of criminal transactions.

"It is stated in the prevailing report that a tonnage pool of this traffic was established as between the connecting carriers, and that the defendants so controlled the routing as to effect a violation of the anti-pooling section of the Act. A careful examination of the evidence fails to convince me that there is any substantial basis for this conclusion. To my mind the inference is not warranted by the testimony. Indeed, this charge seems rather inconsistent with the finding that the actual routing was generally according to the request of the shippers. If in most instances, as is admitted, this traffic was carried by the route selected by the shipper, it is difficult to see how the connecting carriers were at the same time 'pooling' it in violation of the Fifth section. * * * Apart from other considerations, I am of opinion that control of routing by the carrier tends on the whole to public advantage. The more exten-

sively through routes are formed by connecting lines, the wider and more general the movement of traffic under through rates, the greater the benefit—other things being equal—to both producer and consumer. Indeed, the public interest goes, as was said by the Commission in its Second Annual report to the Congress, '*to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibility just as far as may be possible, so that the public may have in the service performed all the benefits and conveniences that might be expected to follow from general federation.*'

"Since these desirable results depend upon voluntary association, and since the inducement to the carriers to unite their facilities must to a great extent come from reciprocal dealings and an equitable interchange of business, it would seem that the control of routing is quite essential to the purposes they have in view, and the mutual interest which prompts them to co-operate. * * *

"It seems to me that the tendency of the principle for which complainants contend is against the legitimate extension of through routes and other forms of lawful association, to say nothing of the opportunity it may afford for prohibited practices. And if denying to the carrier the right in question should have the effect, as plainly it might, of reducing the number of available routes, not only for orange shipments but for the movement of traffic generally, I should regard the result as decidedly unfortunate. Therefore, without amplifying the argument, on grounds of public policy, and having reference to the greatest public benefit, including observance of the law in other respects, I hold that

the rule most likely to prove beneficial in practical operation is the rule which accords the right of routing to the carrier."

Kearney Case.*

*"The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant * * * finding that such disparity constituted an undue discrimination."—Decision of the Supreme Court in the "Import Rates" case.*

The complainant before the Commission, a citizen of Kearney, Nebraska, a traveling salesman by vocation, alleged that rates from Pacific Coast points in California to Kearney, were unreasonable and unjust as compared with those from the same points to Omaha. While other commodities were referred to in the complaint, the case appears to have been heard, and considered on the question of the reasonableness of the rates on sugar. Among the findings of fact by the Commission is the following:

"In charging a higher rate on sugar or other commodities from California points to Kearney, the shorter distance,

* A. J. Gustin *vs.* Burlington & Missouri River Railroad in Nebraska *et al.;* Interstate Commerce Commission (8 Inter. Com. Rep. 481), decided March 9, 1900.

than it charges to Omaha, the longer distance, the defendants, the Burlington & Missouri River Railroad in Nebraska, is not violating the Fourth section of the Act, for the reason that the shorter distance to Kearney is not included within the longer distance to Omaha. The carriage of such freight consigned to the places named is over the same line in the same direction, only so far as Kenesaw, Nebraska, at which point that for Kearney diverges and is carried thence over another of defendant's lines, while that for Omaha continues along the same line. This being the case the necessity for further consideration of the allegation of a violation of section four on the part of this defendant in connection with its charges from California points to Kearney and Omaha is eliminated. The Union Pacific Railway Company with its Western connection, the Southern Pacific Company, then, are the only defendant carriers open to a charge of possible violation of the provision of Section Four in respect to their charges on this particular traffic."

The Commission concluded that the Union Pacific and Southern Pacific in the carriage of sugar over their connecting lines from the Pacific coast to Omaha meet competitive conditions which do not exist at Kearney, and that these differences in conditions justify a somewhat lower rate to Omaha than to Kearney. The difference which should be permitted, however, ought not, in the Commission's opinion, to exceed 15 cents per 100 pounds, while the difference in effect at the time the decision was rendered was 27 cents. The Commission recommended, therefore, that while the

rate of fifty cents per 100 pounds, then in force to Omaha remained in effect, the rate to Kearney should not exceed 65 cents per 100 pounds.

The decision of the Circuit Court in this case has not yet been reported. The Commission states, in its Eighteenth (1904) Annual Report (page 80), that the court has refused to enforce the order on the ground that the Kearney rate was not found to be unreasonable in itself and that it ought not to have been compared with the Omaha rate which was controlled by competition.

Hay Case.*

"If no lawful order has been made there is no order to enforce."
—Decision of the Circuit Court in this case.

This case involved the legality of the transfer of shipments of hay and straw in car loads from the fifth to the sixth class, which was made by the defendant carriers on the first day of January, 1900. The Commission ordered the restoration of the old classification. The Circuit Court did not

* The National Hay Association *vs.* Lake Shore & Michigan Southern Railway Company *et al.;* Interstate Commerce Commission (9 Inter. Com. Rep. 264), decided October 16, 1902. Interstate Commerce Commission *vs.* Lake Shore & Michigan Southern Railway Company *et al.;* Circuit Court, Northern District of Ohio, Eastern Division; is not reported.

consider this a "lawful order" and dismissed the petition, of the Commission, for its enforcement. The Court said in part:

"The defendants object to a decree in this cause against them, first, for the reason that the order made by the Commission is not a lawful order, in that it is an attempt to fix rates. It is undoubtedly the law, as shown by ample authority, and was so conceded at the hearing, that the Commission has no power, directly or indirectly, to make an order fixing rates to be observed in the future. The order made by the Commission, and sought here to be enforced, undeniably undertakes to fix a rate for the carriage of hay and straw, by ordering that the defendant companies shall cease and desist from failing and neglecting to properly classify hay and straw in car loads as sixth-class freight, with other articles included in class 6 of their freight classification, and from failing and neglecting to apply sixth-class rates for the transportation of hay and straw when shipped in car loads. There is another provision of the order, to the effect that the railroad companies shall cease and desist from classifying hay and straw in car loads as fifth-class freight and from charging and exacting fifth-class rates for the transportation of such commodities in car load quantities. * * *

"It is no province of this court to sit in review of the order of the Commission. This hearing is *de novo*, and this suit, as has been stated, has for its purpose the enforcement of a lawful order of the Commission. If no lawful order has been made, there is no order to enforce. * * *

"The question arises, Can the first part of the order which directs the defendants to cease and desist from keeping hay and straw in the fifth class and charging the rates attached thereto stand alone without support from the last part of the order, which directs that hay and straw shall be placed in the sixth class and be subject to the freight rate attached to that class? If only the second part of the order had been made it would have included the first. An order that hay and straw shall be put into the sixth class contains within itself an order that it shall be taken from the fifth-class, since commodities cannot be in two classes at the same time any more than a physical object may be in two localities at the same time. It seems plain, from the opinion of the Commission and its findings of fact that what was sought to be done was to remedy what appeared to the Commission to have been the unlawful conduct of the defendants, to wit, the raising of hay and straw from the sixth class to the fifth. The order, therefore, was adopted to compel the railroads to reverse their action and restore hay and straw to the sixth class. * * *

"I find, then, that the order, as an entirety, is beyond the power of the Commission to make, and is, therefore, not a lawful order, and is not an order which this court is empowered by the statute to enforce.

"It has been urged in behalf of the Commission that the court has general equity powers in this cause to make such mandatory injunction, other than the enforcement of the order of the Commission, as will satisfy justice. The Act itself confines the action of this court to the enforcement of the lawful orders or requirements of the Interstate Com-

merce Commission. It has been frequently decided in the Federal courts that, under the act, the function of the court is to enforce, or refuse to enforce, the order of the Commission as made; that the court can not amend or modify an order to make another order; that the Federal court has no revisory power over the orders of the Commission and that it cannot undertake to decide whether the respondents have violated an order which the Commission might lawfully have made. There is ample reason for this holding, in this, that the only standing in court which the Interstate Commerce Commission has as a complainant is by virtue of the statute; that it has no general equities in its favor; and that, consequently, the court must be confined in its orders and decrees, when the Interstate Commerce Commission is a complainant, to the rights of recovery given to the Commission by the statute.

"This view of the law of the case and the record renders it unnecessary to go into the question as to whether or not 30 cents per 100 pounds was an unreasonable freight charge for hay and straw. Taking into the consideration only the cost of carrying hay and straw, and their character as articles of transportation, as shown by the evidence, it is not clear at all that the rate of 30 cents per 100 pounds is an unreasonable and unjust freight charge. The contention of complainant is, rather, that charging a different freight rate for the carriage of hay and straw from the rate charged for the carriage of wheat, is unfair discrimination against wheat. These articles are so different in their character, and the conditions of traffic with respect to wheat are so entirely different from those which pertain to the carriage

of hay and straw, that I am of the opinion that the fact that wheat is carried for a less rate than hay and straw is not proof that the higher rate charged for the carriage of hay and straw is unreasonable and unjust."

APPENDIX.

APPENDIX.

EXTRACTS FROM THE ACT TO REGULATE COMMERCE.

First Section.

The provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a

contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Second Section.

That if any common carrier subject to the provisions of this act, shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Third Section.

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corpora-

tion, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act, shall according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Fourth Section.

That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind or property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Thirteenth Section.

That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Sixteenth Section.

(As amended March 2, 1889.) That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the Circuit Court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or

other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations, now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such

matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the Circuit Court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial the findings of fact of said Commission as set forth in its report shall be *prima facie* evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall

waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as a part of the costs in the case. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.